DOCUMENT RESUME

ED 070 897 VT 018 475

AUTHOR	Sanders, Rabun C., Jr.; And Others
TITLE	Prisoners' First Amendment Rights Within the Institution. Criminal Justice Monograph. Volume III, No. 3.
INSTITUTION	Sam Houston State Univ., Huntsville, Tex. Inst. of Contemporary Corrections and the Behavioral Sciences.
NOTE	112p.
EDRS PRICE	MF-$0.65 HC-$6.58
DESCRIPTORS	Administrative Policy; Citizenship; Correctional Rehabilitation; *Corrective Institutions; Court Doctrine; *Court Litigation; Criminology; Due Process; Federal Laws; *Freedom of Speech; *Legal Problems; Legal Responsibility; *Prisoners; Religion

ABSTRACT

This monograph examines prisoners' rights to freedom of speech, religion, and petition under the First Amendment to the United States Constitution. The courts had previously taken the attitude that the operation of penal institutions was beyond their jurisdiction, but the suppression of and restrictions on the exercise of first amendment freedoms by prisoners have received increasing judicial scrutiny during the past decade. The few successful petitions of the many submitted to the courts by prisoners have had an effect which extended far beyond their institutional origins. One reason for increased judicial concern about the rights of prisoners arose from the change in prison philosophy by correctional authorities from the concept of punishment and retribution to one of rehabilitation. To determine the state of case law as it pertains to the rights of prisoners under the first amendment rights guaranteed to all citizens, law libraries were researched and questionnaires sent to all 50 state departments of corrections and also to four federal correctional institutions. The purpose of the questionnaire was to compare the announced policies of the institutions with requirements of the court decisions. The form used is appended to the document. (MF)

ED 070897

U.S. DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
OFFICE OF EDUCATION
THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL OFFICE OF EDUCATION POSITION OR POLICY

CRIMINAL JUSTICE
MONOGRAPH

Vol. III, No. 3

PRISONERS' FIRST AMENDMENT RIGHTS WITHIN THE INSTITUTION

Rabun C. Sanders, Jr.
Hazel B. Kerper
George G. Killinger
John C. Watkins

INSTITUTE OF CONTEMPORARY CORRECTIONS
AND THE BEHAVIORAL SCIENCES
SAM HOUSTON STATE UNIVERSITY
Huntsville, Texas 77340

VT018475

FILMED FROM BEST AVAILABLE COPY

TABLE OF CONTENTS

CHAPTER PAGE

I. INTRODUCTION.................................... 1

The Problem.................................... 3

Methods of Investigation.................................... 6

Purpose of the Study.................................... 8

II. JUDICIAL REPUDIATION OF NON-INTERVENTION.................................... 12

The "Hands Off Doctrine".................................... 13

Available Remedies.................................... 26

III. FREEDOM OF RELIGION, SPEECH AND PETITION IN THE PENAL INSTITUTION.................................... 37

Freedom of Religion.................................... 40

Freedom of Speech.................................... 55

Right to Petition.................................... 65

Alternatives to Courtroom Confrontations.................................... 81

IV. SUMMARY AND CONCLUSIONS.................................... 89

BIBLIOGRAPHY.................................... 96

APPENDIX A. Sample Questionnaire.................................... 103

APPENDIX B. Institutions Responding.................................... 110

CHAPTER I

INTRODUCTION

Throughout its history the American prison system has been characterized by the mistreatment of prisoners, prison riots,[1] and attempts by a few aroused citizens to institute reforms.[2] The concept of "penitentiaries" and "penal institutions" has long revolved around the citizens' expectations that "convicts" should be subjected to revenge, deprivations, and harsh treatment in order for such criminals to pay their debt to society.[3] The citizenry has always considered the convicted criminal as a person outside the law who should be deprived of all rights.

The concept that prisoners must be deprived of most of the normal rights and privileges of the citizen in order to maintain discipline within the prison has been one of the basic beliefs of American prison administrators. The inconsistency of citizens of a free country being deprived of all rights upon conviction of a crime was noted in 1831 by two Frenchmen, Gustave de Beaumont and Alexis de Tocqueville, in their study of the American prison system. They stated:

---

[1] See generally V. FOX, VIOLENCE BEHIND BARS (1956).

[2] H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 331 (1959).

[3] _Id_. at 329-30.

> . . . [I]t must be acknowledged that the penitentiary system in America is severe. While society in the United States gives the example of the most extended liberty, the prisons of the same country offer the spectacle of the most complete despotism. The citizens subject to the law are protected by it; they only cease to be free when they become wicked.[4]

During the nineteenth century prison administrators eliminated most of the inhuman treatment to which prisoners had been subjected.[5] Until recent years the only concern that the courts have exhibited toward prisoners has been to insure that a prisoner was legally confined and that he was provided the basic necessities and treatment required to insure his survival.[6]

During the late 1950's and early 1960's, however, the courts began to show an increasing concern about the plight of prisoners and their treatment by prison authorities. This trend has continued, and during the past ten years, the scope of prisoner rights--especially constitutional rights--has been greatly expanded by judicial decisions.

This thesis is limited to an investigation of prisoners' first amendment rights of freedoms of religion, speech, and petition. The first amendment to the United States Constitution states that:

---

[4] G. BEAUMONT & A. TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES 79 (1833).

[5] Tappen, "The Legal Rights of Prisoners," 293 ANNALS 99, 100 (1954). This problem has not been completely eliminated. See Wright v. McMann, 387 F.2d 519 (2nd Cir. 1967).

[6] F. COHEN, THE LEGAL CHALLENGE TO CORRECTIONS: IMPLICATIONS FOR MANPOWER AND TRAINING, 65-66 (1969).

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[7]

The Problem

Statement of the Problem

During the past decade a revolution has occurred in the field of criminal law. This revolution was primarily concerned with the rights of the accused prior to and during his trial. The major vehicle for this revolution was the fourteenth amendment which the Supreme Court used to apply the provisions of the fourth, fifth and sixth amendments to the states.[8] When the Supreme Court handed down the decisions of cases such as Mapp v. Ohio,[9] Escobedo v. Illinois,[10] and Gideon v. Wainwright,[11] many of the foremost leaders in the fields of law enforcement and law predicted that police agencies would no longer be able to operate effectively. This dire prediction did not occur; and, according to many police officials, the decisions were responsible for the establishment of higher standards of performance by many police agencies without a corresponding decrease in effectiveness.[12]

---

[7] U. S. CONST. amend. I.

[8] THE CRIMINAL LAW REVOLUTION, vii (1969). This publication is a compilation of Supreme Court decisions which have been edited by the editors of the Criminal Law Reporter.

[9] 376 U.S. 643 (1961).

[10] 378 U.S. 478 (1964).

[11] 372 U.S. 335 (1963).

During the same period, the courts began to make some cursory examinations of the restrictions placed upon the exercise of constitutional rights by prisoners confined in both state and federal prisons. Prior to this time the judicial branch had adopted the attitude that the operation of penal institutions was an executive function beyond their jurisdiction. In a paper concerning prisoner rights, prepared for the Federal Bureau of Prisons in 1961, this attitude of non-intervention was labeled the "hands off doctrine."[13]

The suppression of and restrictions on the exercise of first amendment freedoms by prisoners have been subjected to ever-increasing judicial scrutiny. Petitions submitted to the courts by Black Muslim prisoners alleging that prison officials were placing unconstitutional restrictions on their right of freedom of religion have been one of the primary factors responsible for the increased judicial concern for prisoner rights.[14]

---

[12] Packer, "The Courts, The Police, and The Rest of Us," 57 J. CRIM. L.C. & P.S. 238, 240-41 (1966). According to Capt. John Walsh, chief of the St. Louis Police Department, the decisions of the Supreme Court helped police departments. Rubin, "The Administrative Response to Court Decisions," 15 CRIM. & DELIQ. 377, 385 (1969).

[13] Note, "Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts," 72 YALE L. J. 506 n.4 (1963).

[14] Note, "Judicial Intervention in Prison Administration," 9 WM. & MARY L. REV. 178, 187 (1967).

Undoubtedly, the sweet smell of success generated by each court decision in favor of a prisoner has spread throughout the prison systems of the country and has generated additional inmate petitions. As a result, prison officials are involved increasingly in defending their decisions in time-consuming courtroom contests, the court dockets have become even more clogged, and many prisoners have become more concerned with preparing petitions to the courts than with preparing themselves for their eventual return to free society. The problem for this thesis was to determine the state of case law as it pertains to the rights of prisoners to enjoy the rights guaranteed to all citizens by the first amendment.

Importance of the Study

Although the vast majority of petitions submitted to the courts by prisoners have been rejected as having no basis for relief, the few successful petitions which have challenged prison rules or regulations have had an effect which extended far beyond the walls of the institution from which the petition emanated. Prison officials tend to react defensively when called upon to defend decisions made by them or their subordinates. These officials view such judicial intervention as a direct threat to their traditional discretionary authority and to their ability to perform the correctional task with which they have been charged.[15]

Many prison administrators' concept of judicial review has been that judicial intervention is synonymous with court involvement in day-to-day operational decisions of correctional administrators and workers. This study of the "hands off doctrine" and prisoners' first amendment rights as determined by the courts refutes the concept of judicial dominance and demonstrates that the courts, with few exceptions, are primarily interested in insuring that prison regulations are reasonable, that discretionary powers are not abused, and that prisoners receive nondiscriminatory treatment.[16]

Methods of Investigation

The primary sources of information for this study were the facilities of the Sam Houston State University Library and the law library of the University of Houston School of Law. Additional reference material was obtained from the Legal Section, Texas Department of Corrections, and from prison rule books provided by several correctional institutions throughout the United States. Additional data concerning rights and privileges afforded prisoners were obtained from a questionnaire which was sent to all fifty state departments of corrections and four randomly selected federal correctional institutions.

---

[15] Kimball & Newman, "Judicial Intervention in Correctional Decisions: Threat and Response," 14 CRIM. & DELIQ. 1, 2-5 (1968). Also see generally "The Administrative Response to Court Decisions," supra note 12.

[16] Id.

Library Sources

Textbooks and treatises in the fields of criminology, corrections and law have not yet included material concerning the constitutional rights of prisoners within the correctional institution. Such references do contain, in many instances, material concerning cruel and unusual punishment and civil rights lost upon the conviction of a crime.[17] The primary source of reference materials for this study was the cases reported in the National Reporter system and located in the law library of the University of Houston School of Law. The secondary source of reference materials was provided by various legal journals such as the Journal of Criminal Law, Criminology and Police Science; Yale Law Journal; Virginia Law Review; University of Pennsylvania Law Review and others. The American Correctional Association Manual of Correctional Standards and The President's Commission on Law Enforcement and Administration of Justice Task Force Reports provided useful background data.

Inmate Rule Books

Upon request, various correctional institutions provided the author with copies of rule books issued to inmates. These rule books were utilized to obtain background data as to current policies and regulations of correctional institutions.

---

[17] See generally S. RUBIN, THE LAW OF CRIMINAL CORRECTIONS (1963).

The Questionnaire

Upon completion of a review of court decisions which have affected the status of prisoners' first amendment rights within the correctional institution, a questionnaire using these decisions as a guide was prepared and dispatched to the directors of the correctional systems of all fifty states and to the directors of four randomly selected federal correctional facilities. The purpose of the questionnaire was to compare the announced policies of correctional institutions with requirements of the court decisions. Inasmuch as the information obtained by the questionnaire provided supplementary information only, the data obtained are reflected in appropriate footnotes.

Purpose of the Study

The court decisions over the past ten years concerning prison rights within the institution have established some basic guides for prison administrators to follow. A great number of these decisions involve prisoners' first amendment rights and set out permissible limitations which may be placed upon these rights. It is imperative that prison administrators be aware of the guidelines already established by the courts in order to avoid time-consuming court contests and in order to be aware of the trend that is developing in the law concerning the rights of inmates.[18]

One of the reasons given for the increased judicial concern for the rights of prisoners is the move by correctional authorities from a prison philosophy of punishment and retribution garnished with harsh treatment to a philosophy of rehabilitation based upon scientific investigation and methods.[19] Correctional authorities are accepting ever-increasing responsibilities in the area of rehabilitation and treatment by virtue of the courts relinquishing, to a great extent, the task of determining the place of confinement, the type of rehabilitation treatment needed, and, in many cases, the length of time the individual must remain in confinement. Therefore, prison authorities must accept the responsibility of establishing well-defined policies which are reasonable, and these authorities must insure that such policies are implemented without arbitrary discrimination. The reluctance of correctional administrators to devise and implement written policies and procedures for the purpose of guiding correctional workers and protecting the rights of inmates could cause the courts to hand down decisions establishing rigid guidelines for prison administrators to follow.[20] It has been noted that:

---

[18] "It may be comforting for correctional personnel to know that the trend toward review of their decisions is not an isolated one, directed specifically at the correctional system, but is part of a broader movement toward close scrutiny of administrative power over individuals. One sees similar indications of the courts' willingness to test the propriety of welfare agencies' dealings with their clients and of schools' dealings with their students." "Judicial Intervention in Correctional Decisions: Threat and Response," _supra_ note 15, at 4.

[19] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE TASK FORCE REPORT: CORRECTIONS 12 (1967).

> Challenges do not arise very frequently in those few states where penology remains crude and sometimes brutal, but are more common in those correctional systems that pride themselves on their benevolence and have sincerely adopted rehabilitative rather than punitive methods. . . . It takes unusual insight to recognize that the very fact of being challenged marks the system as maturing, responsible, and capable of tolerating demands that it act fairly.[21]

This study was based on the assumption that the courts will continue to depart from the "hands off doctrine" and will increasingly review the decisions and policies of prison administrators. The intensity and direction of this trend will be determined to a great extent by the actions of the correctional bureaucracy.

It was also assumed, that as inmates discover the successes of other inmates in challenging prison policies and regulations, the number of frivolous and unfounded petitions prepared by inmates and forwarded to the courts will increase. The additional burdens that this will place on the correctional systems and the courts can, to a large extent, be avoided if detailed operational policies are developed and if systems for reviewing the complaints of prisoners are implemented.

---

[20] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE TASK FORCE REPORT: CORRECTIONS 82-83 (1967).

[21] "Judicial Intervention in Correctional Decisions: Threat and Response," supra note 15, at 4.

The purpose of this study was to review the court's increasing scrutiny of restrictions by correctional authorities on inmates' first amendment freedoms, to examine the remedies available to inmates when such rights are unnecessarily denied, and to determine what alternatives are available to correctional authorities so that prisoner rights can be protected while at the same time eliminating unfounded and harassing complaints by prisoners to the courts. The basic questions answered by this study are:

1. To what extent have the courts abandoned the "hands off doctrine?"

2. What remedies are available to prisoners when, in their opinion, their rights have been unduly suppressed?

3. What is the status of the first amendment rights of religion, speech, and petition within the correctional institutions as determined by the courts?

4. What tests are to be applied in determining allowable restrictions on the first amendment rights of religion, speech, and petition within the correctional setting?

5. What alternatives, other than courtroom confrontations, are available to the prison administrator?

CHAPTER II

JUDICIAL REPUDIATION OF NON-INTERVENTION

Until recent years the only concern expressed for prisoners by the courts was that they should be provided the necessities required for survival and that the treatment received by them should not be unduly harsh. Even a prisoner's right to be free from cruel and unusual punishment has been neglected by the courts until recent years.[1] The courts have traveled far in their revolutionary trek through the criminal law, and there is abundant evidence that they have embarked on a similar activism in the law of prisoner rights. In the past the courts have been quite willing to listen to petitions from prisoners asking for their release from prison because of a deprivation of rights during the trial process. The courts have also been willing to hear petitions alleging physical mistreatment by prison employees.[2] However, only in recent years has the judiciary been willing to even hear petitions concerning prison rules or decisions based upon the discretionary authority of prison administrators.[3] This chapter will discuss the historical basis of judicial reluctance to interfere in the administration of prisons, the growing trend away from such judicial non-intervention, and the procedural remedies available to prisoners to bring prison rules and regulations to the attention of the courts.

---

[1] S. RUBIN, THE LAW OF CRIMINAL CORRECTIONS 383-84 (1963).

[2] F. COHEN, THE LEGAL CHALLENGE TO CORRECTIONS: IMPLICATIONS FOR MANPOWER AND TRAINING n.14 at 66 (1969).

[3] Kimball & Newman, "Judicial Intervention in Correctional Decisions: Threat and Response," 14 CRIME & DELINQ. 1, 2 (1968).

The "Hands Off Doctrine"

The traditional position of the courts as to the rights of prisoners can be readily identified in the often quoted passage from Ruffin v. Commonwealth:[4]

> [The prisoner] has, as a consequence, of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State.[5]

The "hands off doctrine," or doctrine of judicial non-intervention, is usually taken to mean that the judiciary refused to become involved in the review or supervision of ordinary prison activities governed by rules and regulations established by institutional authorities.[6] The Fifth Circuit Court of Appeals expressed its concept of the doctrine in Adams v. Ellis[7] when it stated:

> . . . [I]t is not the function of the Courts to superintend the treatment and discipline of prisoners

---

[4] 62 Va. (21 Gratt.) 790 (1891).

[5] Id. at 796.

[6] Note, "Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts," 72 YALE L. J. 506 (1963). [Hereinafter cited as "Beyond the Ken of the Courts"].

[7] 197 F.2d 483 (5th Cir. 1952).

in penitentiaries, but only to deliver from imprisonment those who are illegally confined.[8]

The Historical Basis of the "Hands Off Doctrine"

The basis for the judiciary's reluctance to become involved in reviewing the decisions of correctional administrators can be found in three separate, but somewhat interdependent, rationales. These rationales can be identified as society's demand for retribution, the reluctance of the judiciary to introduce possible impediments into the correctional process, and the concept of the separation of the judicial and executive functions of government.

Society's Demand for Retribution.-One basis for the concept of prisoner rights, or the lack of prisoner rights, is an outgrowth of the old penological concept that the convicted felon was an "outlaw" and therefore had no legal rights. Under this concept the convicted felon could expect to lose his citizenship, his property, and in many cases his life. In essence, he became a non-person.[9]

Although the inhumane treatment afforded prisoners in early days of prison management has been largely eliminated, society's concept of the treatment to which prisoners should be subjected has changed very little. Society's demand for punishment was aptly stated by Karl Menninger in his book entitled The Crime of Punishment. Doctor Menninger stated:

---

[8] Id. at 485. "Courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations." Banning v. Looney, 213 F.2d 771 (10th Cir.), cert. denied 341 U.S. 859 (1954).

[9] Tappen, "The Legal Rights of Prisoners," 293 ANNALS 99 (1954).

> The idea of punishment as the law interprets it seems to be that inasmuch as a man has offended society, society must officially offend him. It must deliver him tit for the tat that he committed. This tit must not be impulsive retaliation; not mob action. It must be done dispassionately, by agency, by stipulation, and by statute. It must be something that will make the offender sorry (or sorrier) for what he did and resolve to do it no more.
>
> Let no one deceive himself about the intention of the prison to be a terrible place. . .[10]

Even today, society expects harsh treatment to be meted out to the prisoner. When one institution converted to a five-day work week for prisoners, there was a loud outcry by the public accusing the prison administrators of "coddling" the inmates.[11]

Also, society fears the prisoner and considers the primary task of prison officials to be the securing of prisoners.[12] Society's demand that it be protected from prisoners created the penological concept that the basic task of the prison administrator was to insure the custody of the inmates who had been committed to his charge. A 1939 report prepared by the United States Attorney General stated:

---

[10] K. MENNINGER, THE CRIME OF PUNISHMENT 71 (1966).

[11] H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 331 (1959).

[12] The reasons that prisoners engender a feeling of fear into society are numerous and complex. "The prisoner is the victim of the psychology of the primitive taboo transferred to our time and social surrounding. In primitive times, the violator of the law was regarded as one who had broken the rules laid down by the gods. Today he is the violator of the rules of the herd, which are still regarded as quasi-devine. The inmate bears the brand of the scapegoat and like the violator of taboos in an earlier time, he must be exiled from the group--in this case by being imprisoned." Id. at 356.

> The first business of the prison administrator is to keep his men. This responsibility inevitably overshadows every other concern. . . . All else must be subordinate to this principle. . . .[13]

Although correctional administrators have developed a philosophy of rehabilitation, the concept of custodial pre-eminence has not been completely abandoned.[14]

Therefore, because of society's preoccupation with obtaining retribution and self-protection, the courts have been quite unwilling to interfere with the promulgation of regulations designed to insure the custody of prisoners.[15] Acknowledgement of this concept was evident in Pierce v.

---

[13] DEP'T OF JUSTICE, 5 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, PRISONS 86 (1939).

[14] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE TASK FORCE REPORT: CORRECTIONS 3 (1967). [Hereinafter cited as TASK FORCE REPORT: CORRECTIONS]. "The idea of restraint as a necessary ingredient in corrections remains as a philosophic legacy of this era. And, to an extent that no outsider can appreciate, corrections today is shaped also by the tangible remnants of the outmoded but durable structures in which it is housed." Id.

[15] "Beyond the Ken of the Courts," supra note 6, at 520-21. ". . . [I]t is important to note that the argument addressed to the courts and adopted by them in their hands-off doctrine is not an argument in defense of the merits of each security regulation. Rather, the contention is that the courts should not even pass on the merits of a prison regulation. . . .The objection is not formulated in terms of a fear that the court will hold a regulation deemed essential to be void; rather it is asserted that the mere assumption of jurisdiction over the subject matter will of itself undermine prison authority and thwart the authorities efforts to fulfill the task of custody." Id. at 521.

LaVallee[16] when the court stated:

> . . . A large prison population is committed to the custody of a minority of prison employees and authorities. Discipline is necessary for the protection of both the inmates and the public.[17]

Judicial Reluctance to Interfere with Prison Objectives.-The very structural design of the American prison system has encouraged the courts to adopt an attitude of non-intervention. The courts opted for the non-intervention policy because of the belief that the judiciary lacked the knowledge to dictate policy to prison administrators who supposedly possessed the expertise required to maintain control of large numbers of prisoners. This attitude was reflected by the court in Long v. Parker[18] where it was stated:

> The power of promulgating regulations necessary for the safety of the prison population and the public as well as for the maintenance and proper functioning of the institution is vested in correction officials with expertise in the field and not in the courts. There can be no question that they must be granted wide discretion in the exercise of such authority.[19]

Prison officials have often argued that inasmuch as the goal of the penal institution is rehabilitation, the introduction of increased judicial review would interfere with the professional and diagnostic role of the correctional worker. Also, these officials have argued that such judicial review would unnecessarily restrict the correctional worker's freedom to experiment with new rehabilitative methods.[20] Judicial reluctance to review even the reasonableness of correctional decisions was reflected in Stroud v. Swope[21] when the court refused to order prison officials to limit restrictions on business correspondence to those which could be considered reasonable. In refusing the request of the petitioner the court held that:

---

[16] 212 F. Supp. 865 (N.D.N.Y. 1962).

[17] Id. at 869.

[18] 390 F.2d 816 (3rd Cir. 1968).

[19] Id. at 820. The court did grant some relief as certain rules were applied discriminately.

> If we assumed the authority to make an order of the character here proposed, it would certainly impose upon the courts the future duty of deciding the issue of "reasonableness" in the event appellant and the prison warden were hereafter unable to agree. . . . We reject the argument that any such burden of supervision may lawfully be imposed upon, or assumed, by the courts.[22]

Some administrators have argued that the extension of legal rights to prisoners would cause inmates to devote their energies to preparing and pursuing court actions rather than availing themselves of the rehabilitative opportunities available.[23]

The Separation of Executive and Judicial Powers.- The final rationale upon which the courts have based their policy of non-intervention is the concept of separation of governmental powers. The federal courts have considered the federal prisons to be beyond their jurisdiction because of the delegation of authority by Congress to the Attorney General[24] to administer the prison system. State courts have relied on the same rationale in refusing to review the complaints of state prisoners. In McBride v. McCorkle[25] the judicial branch relied, in part, upon a state statute which delegated the administration of state institutions and agencies to the State Board of Control. The court held:

---

[20] TASK FORCE REPORT: CORRECTIONS, supra note 14, at 83.

[21] 187 F.2d 850 (9th Cir.), cert. denied, 342 U.S. 829 (1951).

[22] Id. at 851.

[23] TASK FORCE REPORT: CORRECTIONS, supra note 14, at 83.

> . . .We do not believe the Legislature or the rules of the court intended any such review [of prison regulations] . . . . Such matters are left to the discretion of prison authorities so long as their conduct does not involve deprivation of the prisoner's constitutional rights and is not clearly capricious or arbitrary.[26]

The federal courts have been even more reluctant to interfere with the administration of state prisons, preferring to reserve such action for the state courts. In Startti v. Beto[27] the court pointed out that:

> It is well settled that federal courts will not interfere with matters of discipline and control in

---

[24] 18 U.S.C.A. sec. 4001. In refusing to review the decision of a lower court to dismiss a federal prisoner's complaint concerning the use of the mails the court stated, "Congress has entrusted that responsibility (supervision of prison discipline) to the Bureau of Prisons set up in the Department of Justice." Numer v. Miller, 165 F.2d 986 (9th Cir. 1948); ". . . [T]he control of federal penitentiaries is entrusted to the Attorney General of the United States and the Bureau of Prisons." Dayton v. Hunter, 176 F.2d 108, 109 (10th Cir.), cert. denied, 338 U.S. 888 (1949).

[25] 130 A.2d 881 (N.J. Sup. 1957).

[26] Id. at 885.

[27] 405 F.2d 858 (5th Cir. 1969).

state prisons.[28]

The Trend Toward Judicial Intervention

One of the first indications that the judicial branch would relent in its policy of refusing to consider complaints of prisoners except in cases of illegal detention and extreme cases of physical abuse was the decision of the court in Coffin v. Reichard.[29] It was held that:

> A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.[30]

In subsequent cases where the courts have consented to review the complaints of prisoners alleging deprivation of rights, the courts have cited the concept established by Coffin v. Reichard.

Increased Judicial Intervention.-At what point in time the judicial branch began to turn away from the "hands off doctrine" is unclear. Although there had been cases involving prisoner rights in the 1940's and 1950's, such cases were extremely rare. The first clear indication of the judiciary's increasing concern over the rights of prisoners surfaced in the early 1960's.[31] In several cases during this period the courts refused to follow the rationale of Banning v. Looney[32] and adopted the concept that so long as the rules and regulations promulgated by prison authorities were reasonable and did not abuse administrators' authority or discretion, the courts would not interfere.[33] While these cases did not reflect an outright repudiation of the principle of non-intervention, they did reflect the growing attitude of the courts that while prison officials must be given a large measure of discretion in order to operate penal institutions, such officials would not be allowed to abuse such discretion.

---

[28] Id. at 859. "This court (Seventh Circuit) has been hesitant to interfere with the administration of state penal institutions." Ortega v. Ragen, 216 F.2d 561 (7th Cir. 1954), cert. denied, 349 U.S. 940 (1955).

[29] 143 F.2d 443 (6th Cir. 1944), cert. denied, 325 U.S. 887 (1945).

[30] Id. at 445.

[31] Note, "Judicial Intervention in Prison Administration," 9 WM. & MARY L. REV. 178, 179-82 (1967).

In 1962 the Supreme Court rejected the concept that if prisoners were allowed to submit complaints to the courts, prison discipline would be impaired. In United States v. Muniz[34] the Court affirmed a lower court decision which allowed two federal prisoners to bring suits against the Government under the Federal Tort Claims Act. The Court stated:

> We . . . are reluctant to believe that the possible abuses stemming from prisoners' suits are so serious that all chance of recovery should be denied. It is possible, as the Government suggests, that frivolous suits will be brought, designed only to harass or, more sinister, discover details of prison security useful in planning an escape. . . . It is also possible that

---

[32] 213 F.2d at 771. See note 8, supra.

[33] Sostre v. McGinnis, 334 F.2d 906 (2nd Cir.), cert. denied, 379 U.S. 892 (1964); Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961); In re Ferguson, 361 P.2d 417 (Cal.) cert. denied, 368 U.S. 864 (1961).

[34] 374 U.S. 150 (1962).

> litigation will damage prison discipline. . . . However, we have been shown no evidence that these possibilities have become actualities in the many States allowing suits against jailers, or the smaller number allowing recovery directly against the States themselves.[35]

During the mid-1960's, the number of prisoner petitions contesting prison restrictions as distinguished from illegal detention increased. While most of the petitions did not obtain the relief requested by the petitioner, the courts did accept the petitions and listen to them on the basis of their merits rather than dismissing them for failing to state grounds for relief.[36] However, a few such petitions were successful, and the concept began to evolve that regulations used to suppress either constitutional freedoms or legal rights must be judged by a more stringent standard than mere reasonableness.[37]

By end of the decade of the 1960's, the concept was well established that the courts would review prisoner complaints concerning constitutional rights, discrimination, and arbitrary and capricious decisions by prison officials.[38] In rejecting the "hands off doctrine" the Fifth Circuit

---

[35] Id. at 162-63.

[36] McCloskey v. Maryland, 337 F.2d 72 (4th Cir. 1964); Sostre v. McGinnis, 334 F.2d 906 (2nd Cir.), cert. denied, 379 U.S. 892 (1964); Desmond v. Blackwell, 235 F. Supp. 246 (M.D. Pa. 1964).

[37] See text accompanying notes 54-66, Chapt. III, infra.

[38] Sharp v. Seigler, 408 F.2d 966 (8th Cir. 1969); Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969); Smith v. Schneckloth, 414 F.2d 680 (9th Cir. 1969); Bethea v. Crouse, 417 F.2d 504 (10th Cir. 1969); Knuckles v. Prasse, 302 F. Supp. 1037 (E.D. Pa. 1969).

Court of Appeals held in 1968 that rules affecting constitutional rights would be subjected to judicial scrutiny.[39] In addition to relying on constitutional safeguards in rejecting the "hands off doctrine," the court also stated that:

> Additional support for judicial review can be found in the proposition that if a prisoner is serving time to "pay his debts to society," any further restraints or deprivations in excess of that inherent in the sentence and in the normal structure of prison life should be subjected to judicial scrutiny.[40]

Although the courts have refrained generally from infringing upon the discretionary authority of prison officials,[41] two recent decisions have indicated that the judicial branch may become deeply enmeshed in establishing detailed and definitive guidelines for prison administrators to follow. In Barnett v. Rodgers[42] the court made a detailed examination of the menu design of a federal institution in order to determine if the administrators could provide concessions to religious diets of prisoners without major interference in the prison regimen.[43] The petitioners made no claim that other groups were being accorded privileges which were denied to them. In fact, the petitioners were requesting special privileges not extended to other inmates. Judge Tamm, who concurred in the results of the decision only, cautioned his colleagues as to the possible pitfalls of delving too deeply into the management of prison institutions. He stated:

---

[39] Jackson v. Godwin, 400 F.2d 529, 535 (5th Cir. 1968).

[40] Id. at 535. In a recent New York case a federal court held that a prisoner had been punished without being afforded an opportunity to speak. Although the court intervened in the disciplinary procedures of a state institution, it stated, ". . . [T]here is no need for a full panoply of judicial due process which is the language and recommendations contained in the Task Force Report on Corrections. . . ." Kritsky v. McGinnis, 7 Crim. L. Rep. 2310 (N.D.N.Y. June 12, 1970).

[41] See cases cited in note 38, supra.

[42] 410 F.2d at 995.

[43] See text accompanying notes 45-50, Chapt. III, infra.

> I fear that my learned brethren of the majority are in this case pursuing an abstract constitutional issue for its own sake and are creating an opus monstrous of the ends without means. If the ultimate outcome of these proceedings is to be judicial supervision of penal institutions in such minute detail as to encompass even the selection and makeup of daily menus and direction of the service of coffee three times a day (as appellants demand) all bottomed upon the theory that there is religious freedom involved, the court having opened this Pandora's Box must not hereafter complain about hornets.[44]

The most significant indication of the continued abandonment of the "hands off doctrine" by the judiciary was evident in a recent case involving the complaints of a New York State prisoner. A federal district court, relying on various constitutional provisions, ordered the state prison system to draw up written policies describing the circumstances under which certain punishments could be administered and setting forth the procedural steps to be followed prior to imposing and carrying out such punishments. The court dictated certain provisions which were to be included in the revised rules and ordered that the rules be submitted for approval prior to being implemented.[45]

---

[44] 410 F.2d at 1004.

While the decisions such as Barnett v. Rodgers and Sostre v. Rockefeller are exceptional, it is not unlikely that, in the absence of appropriate action by prison authorities, other courts may soon adopt a similar philosophy in dealing with alleged violations of prisoner rights. In the face of continuing and expanding judicial intervention into the correctional process, the only logical course of action available to correctional authorities is to reject the urge to react defensively and to immediately bring prison policies into line with court decisions.

Judicial Reluctance to Intervene Still Evident.- Although the courts have repudiated, in part, the "hands off doctrine," the judiciary has expressed a general reluctance to interfere with the administrative discretion considered necessary to maintain discipline within correctional institutions. This reluctance of the courts to become more deeply involved in the administration of prisons is based primarily upon the traditional arguments in favor of non-intervention.[46]

Although the courts express reliance on the traditional arguments which favor the "hands off doctrine," there is some evidence that their reluctance to extend the area of judicial scrutiny is based upon the realization that court dockets are already overcrowded. In Jackson v. Godwin,[47] Judge Hooper, who concurred in the opinion of the court, cautioned both his fellow colleagues and prison officials concerning the growing number of prisoner petitions. He wrote:

---

[45] Sostre v. Rockefeller, 309 F. Supp. 611 (S.D.N.Y. 1970).

[46] See text accompanying notes 9-28, supra. Also, see cases cited in note 38, supra.

> I am advised by the Administration Office that "of the 1088 prisoner cases reported during the first half of the fiscal year 1967, there were 515 that were based on alleged violations of civil rights," and that "the growth in the number of these cases in the last few years has been phenomenal." The situation calls for careful consideration upon the part of both prison officials and judges.[48]

Available Remedies

Writs of habeas corpus, mandamus proceedings and suits under the Civil Rights Act of 1871[49] have provided prisoners their most effective means of obtaining relief from deprivations of constitutional rights and arbitrary rules or regulations capriciously or discriminately applied.[50] These remedies will be examined briefly inasmuch as they have been the primary vehicles used by prisoners to obtain some recognition of first amendment freedoms within the correctional institution. Actions against prison employees under criminal statutes or tort proceedings will not be considered.

---

[47] 400 F.2d at 529.

[48] Id. at 544. Recently U.S. District Court Judge Woodrow Seals stated that prisoner petitions are "shooting out of prison like a machine gun." Houston Chronicle, August 14, 1970, sec. 3 at 1, col. 6.

[49] 42 U.S.C. sections 1983, 1985-86.

[50] "Beyond the Ken of the Courts," supra note 6, at 509-14.

Writs of Habeas Corpus

Although the Supreme Court in 1941 held that prison authorities could not interfere with prisoners' right to seek writs of habeas corpus,[51] it has not been until recent years that appreciable numbers of petitions seeking relief by prisoners have reached the courts. The number of such petitions submitted to federal courts in 1941 by state prisoners was 134.[52] In 1957, state prisoners filed 814 writs in federal courts; and by 1965, the number had increased dramatically to 4,845.[53] Recently Chief Justice Burger stated that:

> . . . [I]n recent years, the federal courts have been literally flooded with habeas corpus cases from state prisoners.[54]

Three traditional limitations on the use of the writ of habeas corpus have restricted its effectiveness as a means of obtaining relief by prisoners. First, inmates must have exhausted all administrative procedures prior to petitioning the court. Additionally, state prisoners must have sought relief from state courts before petitioning federal courts for writs.[55] The obstacle presented to state prisoners by the exhaustion rule has been partially removed by statute. Federal statutes now permit inmates of state institutions to petition federal courts "when there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."[56]

---

[51] Ex parte Hull, 312 U.S. 546 (1941).

[52] "Judicial Intervention in Prison Administration," supra note 31, at 190.

[53] F. COHEN, THE LEGAL CHALLENGE TO CORRECTIONS: IMPLICATIONS FOR MANPOWER AND TRAINING n.17 at 67 (1969).

[54] Burger, "Post Conviction Remedies: Eliminating Federal-State Friction," 61 J. CRIM. L.C. & P.S. 148 (1970).

[55] "Beyond the Ken of the Courts," supra note 6, at 510.

Second, the courts have traditionally held that the only relief which could be granted under a writ of habeas corpus was total release from confinement.[57] Finally, the courts have generally held that the writ was available to test the legitimacy of detention only, and it could not be used to contest the manner or mode of confinement.[58] These limitations were partially rejected in Coffin v. Reichard.[59] The court held that although a prisoner is legally detained, the writ could be used to "protect his other inherent rights."[60] When the court considered what relief could be ordered under the writ, it held that:

> The judge is not limited to a simple remand or discharge of the prisoner, but he may remand with directions that the prisoner's retained civil rights be respected, or the court may order the prisoner placed in the custody of the Attorney General of the United States for transfer to some other institution.[61]

---

[56] 28 U.S.C. sec. 2254 (1958).

[57] "Beyond the Ken of the Courts," supra note 6, at 510-11.

[58] Id.

[59] 143 F.2d at 443.

[60] Id. at 445.

[61] Id.

Although the Coffin decision rejected some of the limitations which had been placed on the use of the writ, a majority of courts continue to follow the traditional concepts of the writ.[62] In a recent decision[63] the court held that the function of the writ of habeas corpus is limited to testing the legality of confinement. The court went on to say that the writ is not properly used to test the manner in which confinement is administered nor is it properly used to investigate complaints of mistreatment "since such complaints do not attack the legality of confinement."[64] The importance of the writ as related to prisoners' first amendment freedoms is that the few successful petitions encouraged other inmates to continue to file writs in "hopes that some distant proceedings before a remote judge [would] enable him to have his cries heard."[65]

Civil Rights Act of 1871

The most frequently used and effective remedy available to state prisoners is the Civil Rights Act of

---

[62] Gallington, "Prison Disciplinary Decisions," 60 J. CRIM. L.C. & P.S. 152, 156-59 (1969); Note, "The Problems of Modern Penology: Prison Life and Prisoner Rights," 53 IOWA L. REV. 671, 700-01 (1967).

[63] Long v. Parker, 390 F.2d 816, 818 (3rd Cir. 1968).

[64] Id. at 818.

[65] "Post Conviction Remedies: Eliminating Federal-State Friction," supra note 54, at 150.

1871.[66] The civil remedy section of the Act provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceedings for redress.[67]

The limitation placed on suits brought under section 1983 is that the deprivations complained of must amount to a violation of the prisoner's rights under the Constitution or federal law. This limitation necessitates the courts determining what rights have been retained by prisoners.[68] In Ortega v. Ragen[69] it was held that the violation of a state law by prison officials did not constitute grounds for action under the Civil Rights Act of 1871. Furthermore, the court decided that the mere withholding of a letter from a prisoner did not, of itself, violate a federally protected right. The court stated:

> Since, as a prisoner, he has no general federal right to receive mail, the plaintiff must show that the

---

[66] "Prison Disciplinary Decisions," supra note 62, at 160; Note, "Constitutional Rights of Prisoners: The Developing Law," 110 U. PA. L. REV. 985, 1008 (1962). See generally Note, "Prisoner Rights Under Section 1983," 57 GEO. L. J. 1270 (1969).

[67] 42 U.S.C. sec. 1983. Although prisoners may seek damages under this statute, most petitions by prisoners have been for injunctive relief. "Prisoner Rights Under Section 1983," supra note 66, at 1292-94.

[68] "Prisoner Rights Under Section 1983," supra note 66, at 1281.

[69] 216 F.2d at 561.

> warden's refusal to surrender this particular letter to him deprived him of some other right that is so protected by federal law.[70]

However, the Supreme Court held that a prisoner who alleged that he was denied permission to obtain religious material and denied privileges afforded to other prisoners had stated a cause of action under the Act.[71] A second limitation inherent in the Act is that federal prisoners may not bring suit under the provisions of this legislation. The afforded protections concern only those actions which deprive an individual of his civil rights by a state or territory under color of law.[72]

Suits brought under Section 1983 have been one of the important factors responsible for the decline of the "hands off doctrine." Although the federal courts have been reluctant to interfere in the operations and discipline of state prisons,[73] the Civil Rights Act circumvents the obstacles which require prisoners to exhaust state remedies and to present complaints which would entitle the petitioner to total release.[74]

---

[70] Id. at 562-63.

[71] Cooper v. Pate, 378 U.S. 546 (1963), per curiam.

[72] "Prison Disciplinary Decisions," supra note 62, at 159. However, prisoners confined in facilities operated by the District of Columbia Department of Corrections may bring suits under section 1983. Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961); Banks v. Havener, 234 F. Supp. 27 (E.D. Va. 1964).

[73] Startti v. Beto, 405 F.2d 858 (5th Cir. 1969).

[74] "Prisoner Rights Under Section 1983," supra note 66, at 1275-79.

Writs of Mandamus

Another remedy which has been made available to prisoners is the writ of mandamus. This writ is a command issued by a court to an administrative, executive or judicial officer directing the recipient to either perform a task which is part of his legal duty or to restore to the petitioner rights or privileges which have been illegally denied.[75] The courts have relied, to a great extent, on the "hands off doctrine" in denying relief under this remedy.[76] In addition, the court must determine what rights--other than constitutional and statutory rights--are retained by the petitioner.[77]

Successful petitions requesting writs of mandamus have been filed in both state and federal courts. The Court of Appeals of New York reversed a lower court's dismissal of a petition by a prisoner requesting that the Commissioner of Corrections be directed to permit the appellant to exercise his freedom of religion.[78] The Fifth Circuit Court of Appeals granted relief to a federal prisoner under a writ of mandamus in Walker v. Blackwell.[79]

---

[75] BLACK'S LAW DICTIONARY 1152 (3rd Ed. 1933).

[76] "The Problems of Modern Penology: Prison Life and Prisoner Rights," supra note 62, at 704.

[77] Numer v. Miller, 165 F.2d 986 (9th Cir. 1948); In re Taylor, 187 F.2d 852 (9th Cir.), cert. denied, 341 U.S. 955 (1951).

[78] Brown v. McGinnis, 180 N.E.2d 791 (N.Y. 1962).

[79] 411 F.2d 23, 29 (5th Cir. 1969).

In reversing a portion of a lower court's decision, the Court of Appeals ordered the warden of the United States Penitentiary in Atlanta to allow Black Muslims to have access to a Muslim newspaper on the same basis that other newspapers were permitted. The court acknowledged that the district court obtained original jurisdiction via the federal mandamus statute.[80] In an earlier case the Third Circuit Court of Appeals upheld a lower court decision which stated that only in the District of Columbia could a district court obtain original jurisdiction of a petition for mandamus.[81]

The ultimate effectiveness of writs of mandamus in prisoner petitions will depend largely on the extent of abandonment of the "hands off doctrine" by the courts. The remedy already appears to be effective in those cases where the complaint of the prisoner concerns a constitutional or statutory right. However, the reluctance of the judicial branch to become involved in the discipline and control of prison institutions may impede further expansion of the remedy.[82]

---

[80] "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. sec. 1361 (1964).

[81] Green v. United States, 283 F.2d 687 (3rd Cir. 1960).

[82] See text accompanying note 46, *supra*.

Summary

This chapter has reviewed the growing trend of judicial intervention into the administration of correctional institutions and the remedies available to prisoners seeking relief in the courts. This review was necessary preparation for understanding the judiciary's concept of prisoners' first amendment rights.

Prior to the relaxation of the courts's traditional policy of non-intervention, the question of prisoners' rights had been discussed primarily in the negative terms of "no rights" except those expressly allowed by the state, rather than in the positive terms of retention of rights. Although some court decisions favorable to prisoners had been reached prior to the decade of the sixties, substantial incursions by the courts into the area of correctional administration and control began after the turn of the decade. Undoubtedly, the pendulum thus set in motion will swing in an ever-increasing arc.

With the advent of the "new penology,"[83] the courts have been more willing to listen to the complaints of convicts and, in many cases, more willing to provide them relief. Although the judiciary continues to view the administration of prisons as primarily an executive function, the courts have reviewed increasingly those rules and regulations which appear to infringe on prisoners' constitutional rights.

---

[83] The term "new penology" was first used as early as 1935. The term is normally used to signify a progressive correctional philosophy based upon treatment of the individual. H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 440-42 (1959).

The remedies most readily available to prisoners who have complained of deprivations of their first amendment freedoms are the writ of habeas corpus, the Civil Rights Act of 1871, and the writ of mandamus. Traditional restrictions[84] on the application of the writ of habeas corpus have somewhat limited its effectiveness and flexibility as a prisoner remedy. All courts, however, have not followed the traditional concepts and have extended the relief available under the writ and eliminated some of the limitations restricting its use. The most popular and effective remedy available to prisoners complaining of deprivations of their constitutional rights is the Civil Rights Act of 1871. The primary limiting factor is that federal prisoners may not bring suits under its provisions. Both federal and state courts have been increasingly willing to accept petitions from prisoners requesting writs of mandamus. The federal courts are reluctant to hear petitions by state prisoners requesting writs of mandamus, but the federal bench is quite willing to listen to requests from federal prisoners.

An awareness of the court's traditional reluctance to review complaints of prisoners will, to some extent, explain the niggardly approach of some courts to petitions of prisoners who complain of deprivations of first amendment freedoms.

---

[84] See text accompanying notes 55-61, supra.

CHAPTER III

FREEDOM OF RELIGION, SPEECH AND PETITION IN THE PENAL INSTITUTION

The freedoms outlined in the first amendment of the United States Constitution[1] and the plight of the convicted prisoner with respect to the security and disciplinary requirements of the penal institution when viewed together create a paradoxical situation.[2] The first amendment freedoms have been provided an aegis in the form of the fourteenth amendment[3] thereby protecting them from abridgment by the states. In Gitlow v. New York, Justice Edward T. Sanford, delivering the opinion of the Court, stated:

> For present purposes we may and do assume that freedom of speech and of the press--which are protected by the First Amendment from abridgment by the Congress--are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.[4]

Not only did Justice Sanford express the concept of the applicability of the fourteenth amendment, but he also identified the fundamentality of the first amendment.[5]

---

[1] U.S. CONST. amend. I.

[2] Price v. Johnston, 334 U.S. 266, (1948). The Supreme Court stated, "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." See also Pierce v. LaVallee, 212 F. Supp. 865, (N.D.N.Y. 1962).

[3] 268 U.S. 652, (1925).

[4] Id. at 666.

[5] Id.

However, it was not until 1927 that the concept of due process was cemented to first amendment freedoms. The language of Gitlow v. New York was cited in Whitney v. California by Justice Sanford when he pointed out that an act which is not unreasonable and which is sufficiently specific is not an infringement upon the first amendment rights which are in turn protected by the due process and equal protection clauses of the fourteenth amendment.[6] In the same case and in a concurring opinion, Justice Brandeis was even more specific in expressing the relationship of the first and fourteenth amendments:

> Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the states. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights.[7]

The Gitlow[8] and Whitney[9] cases are also important in that the concept that the first amendment freedoms are completely beyond any restrictions is rejected. However, it must be noted that the "clear and present danger" test had been established some years earlier in Schenck v. United States.[10] Justice Holmes in delivering the opinion of the

---

[6] Whitney v. California, 274 U.S. 357, 372 (1927).

[7] Id. at 373.

[8] 268 U.S. at 667-68.

[9] 274 U.S. at 271.

[10] 249 U.S. 47 (1919).

Court stated:

> The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger . . . .[11]

After the first amendment freedoms had been characterized as being of a fundamental nature and subject to the "clear and present danger" test, the concept of these rights holding a "preferred" status evolved. This concept[12] was first expressed by Justice Harlan Stone[13] in his footnote 4 to the case of United States v. Carolene Products Co.[14] This concept was more clearly stated by Justice William O. Douglas, who wrote the decision of the Court in Murdock v. Pennsylvania.[15] Justice Douglas stated, "Freedom of press, freedom of speech, freedom of religion are in a preferred position."[16]

The rule that the first amendment freedoms are not completely beyond regulation and restriction was outlined in Chaplinsky v. New Hampshire.[17] Justice Frank Murphy, delivering the opinion of the Court, stated:

---

[11] Schenck v. United States, 249 U.S. 47 (1919).

[12] The "preferred" status concept places on the government the burden of proving the constitutionality of restrictions on first amendment rights, thus removing the presumption of validity from such restrictions. M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 59 (1966).

[13] Id.

[14] 304 U.S. 144, 152, n.4 (1938).

[15] 319 U.S. 105 (1943).

[16] Id. at 115.

[17] 315 U.S. 568 (1942).

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[18]

Obviously, the individual who finds himself convicted and incarcerated cannot expect to enjoy the same application of the principles described above as one who is not so confined.[19] However, he should be able to expect that any restrictions which are placed upon his first amendment freedoms be based, at a minimum, upon reasonable grounds and that such restrictions be sufficiently defined so that the basic precepts concerning these freedoms can be applied in an even-handed manner.

The next requirement of the thesis is to examine the applicability of the first amendment freedoms within the prison milieu as determined by the courts and to ascertain what alternatives, other than courtroom confrontations, are available to the prison administrator.

Freedom of Religion

While freedom of religion is one of the "preferred" freedoms of the first amendment,[20] the practice of religion has never been held to be absolute.[21] This has been particularly true within prison institutions.[22] There has never been any attempt on the part of prison administrators to exclude religion from the prison. In fact, in most instances, prison administrators have encouraged inmates to participate in religious activities.[23]

---

[18] Id. at 571-72.

[19] See Price v. Johnston, 334 U.S. 266 (1948).

The Influence of the Black Muslims

Prior to the mid-1950's, few cases involving freedom of religion within the prison reached the courts.[24] The major influence in the burgeoning cases involving religious freedom has been the Black Muslims.[25] In 1961, the California Supreme Court refused to overrule a prison policy which denied the status of a religion to the Black Muslims.[26] The court held that although a prisoner has the right to any religious belief, he does not enjoy the same constitutional protection concerning the exercise of religion as the unincarcerated citizen. Furthermore, it was held that the teaching of black supremacy as espoused by the Muslims presents a sufficient threat to the security of the prison to justify the prison director's suppression of such teachings.[27]

---

[20] Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

[21] Reynolds v. United States, 25 L. Ed. 244 (1878). See also Everson v. Board of Education, 330 U.S. 1 (1947).

[22] Long v. Parker, 390 F.2d 816 (3rd Cir. 1968). Restrictions on the exercise of religious beliefs are also applicable to free society. It has been held that the right to religious beliefs is absolute while the right to exercise such beliefs is not. "[The first amendment] embraces two concepts,--freedom to believe and to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

[23] King, "Religious Freedom in the Correctional Institution," 60 J. CRIM. L.C. & P.S. 299, 300 (1969). For example, the Texas Department of Corrections awards incentives to its inmates if they participate in religious activities. TEXAS DEP'T OF CORRECTIONS, RULES AND REGULATIONS 9 (1968).

[24] "Religious Freedom in the Correctional Institution," supra note 23, at 300.

In Sewell v. Pegelow,[28] the Black Muslims' entitlement to recognition as a religion was acknowledged by stipulation. In Fulwood v. Clemmer[29] the United States District Court, District of Columbia, was even more specific:

> It is sufficient here to say that one concept of religion calls for a belief in the existence of a

---

[25] Note, "The Problems of Modern Penology: Prison Life and Prisoners' Rights, 53 IOWA L. REV. 671, 684 (1967).

[26] In re Ferguson, 361 P.2d 417 (Cal.), cert. denied, 368 U.S. 864 (1961).

[27] Id. at 423.

[28] 291 F.2d 196 (4th Cir. 1961).

[29] 206 F. Supp. 370 (D.D.C. 1962). In Sostre v. McGinnis, 334 F.2d 906, 907-08 (2nd Cir.), cert. denied, 379 U.S. 892 (1964) the court indicated some reservations when it stated, "We accept, as we must, the findings of the district court that the beliefs of the organization with which plaintiffs associate themselves constitute a 'religion.' However, it is obvious from the evidence in the record that the activities of the group are not exclusively religious."

> supreme being controlling the destiny of man. That concept of religion is met by the Muslims in that they believe in Allah, as a supreme being and as the one true god. It follows, therefore, that the Muslim Religion is a religion.[30]

In its decision the court also pointed out that a person has an absolute right to any religious belief. According to the court the Constitution does not describe or define the term "religion." It held that it was not the court's function to determine the merits or fallacies of a religion. The court stated that regardless of how fanatical or preposterous a religion might be, it was not the function of the judiciary to praise or condemn. Furthermore, what one feels for his religion is not only a matter of knowledge but also a matter of opinion.[31]

Restrictions on the Exercise of Religion

There are two basic kinds of restrictions on religion within the prison. First, there are restrictions which are placed on the practice of all religions.[32] In McBride v. McCorkle[33] the court held that there was no discrimination in refusing to permit Catholic prisoners in segregation to attend Mass with the general prisoner population as all prisoners in segregation were prohibited from attending religious services of their faiths with the general prisoner population.[34] Second, there are restrictions placed upon the practice of certain designated religions which do not apply to the other religious groups within the institution.[35] In Long v. Parker the court stated that where prison regulations restrict one religion more than they do other religions, "the courts will scrutinize the reasonableness of the regulations."[36]

---

[30] Id. at 373. Of the states responding to the questionnaire, the following states recognized the Black Muslims as a religion: Ark., Cal., Colo., Del., Mont., Md., Neb., N.M., Okla., Tenn., Wash., Wisc., and all the federal institutions. The remaining respondents stated that the religion was not recognized or that no request for recognition had ever been received.

[31] Id.

[32] 130 A.2d 881 (N.J. Sup. 1957).

[33] Id.

Allowable Restrictions Must Be Applied Without Discrimination.-The courts have generally held that where reasonable restraints have been placed upon religious practices within the prison, such practices must apply to all religions within the prison[37] unless some aspect of one particular religion presents a clear and present danger to the discipline and control of the institution.[38]

---

[34] Id. at 887.

[35] Long v. Parker, 390 F.2d 816 (3rd Cir. 1968).

[36] Id. at 820.

[37] Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962). Accord, Knuckles v. Prasse, 302 F. Supp. 1036, 1058 (E.D. Pa. 1969) stated that, "Because the door to the practice of religion in prison has been opened, all who would preach religious doctrines must be free to pass through so long as there is no preaching of defiance of prison authority or civil government or other advocacy of acts which create a clear and present danger."

[38] Banks v. Havener, 234 F. Supp. 27 (E.D. Va. 1964).

In Fulwood v. Clemmer[39] it was shown that the District of Columbia Department of Corrections purchased, with public funds, religious medals for Catholic, Protestant, and Jewish inmates. The prisoners were allowed to keep these medals on their person and to wear them. No such medals were purchased for the Muslims nor could they be purchased anywhere within the prison. While attending instructions in Islamic Culture, Fulwood was given a religious medal used by the Moslems and Muslims. Fulwood wore the medal openly until it, along with all other Muslim medals in the prison, was confiscated. There was no indication that the medals of any other religion were confiscated. The court held that not only was the confiscation of the medals a violation of the prisoner's right not to be discriminated against because of his religion, but that the prison administration must also provide Muslim medals from public funds as long as other medals were so provided.[40]

Special Privileges to Accommodate Religious Practice Are Not Generally Required.-However, special religious dogmas which require special treatment or privileges and which interfere with the administration of the prison are not within the protection of the first amendment. Furthermore, the denial of such treatment or privileges is not considered discriminatory. In Walker v. Blackwell[41] several members of the Black Muslims alleged that their rights under the first amendment had been denied because prison administrators had refused to provide them with a special diet and special feeding hours as required by their religion. During the month of December (Ramadan), the Black Muslims require diets without pork and with Akbar coffee and certain special pastries. In addition, this food must be eaten after sunset. The prison officials provided Jewish inmates one special meal a year at the time of Passover. The court discounted this aspect of the argument inasmuch as the Muslims were asking for special privileges for a period of thirty days. The court then held that the added cost of the food, the expense of preparation, and the additional security supervisors who would be required to move the Muslims during the night hours outweighed "whatever constitutional deprivation petitioners may claim."[42] In Childs v. Pegelow[43] members of the Black Muslims brought a suit against the Department of Corrections of the District of Columbia because the administrators, who had been providing a special diet and special feeding hours during Ramaden, used Naval Observatory time to determine sunset rather than the Muslim method of holding up a black and white thread. According to Muslim beliefs sunset has arrived when the difference between the two threads is no longer distinguishable. The court stated that the prison officials had already gone beyond what was required, and that they were entitled to a commendation for their efforts. The court held that:

---

[39] 206 F. Supp. at 374-75.

[40] Id. All respondents, except Ky. which failed to answer all questions pertaining to religion, indicated that prisoners are allowed to wear religious medals.

---

[41] 411 F.2d 23 (5th Cir. 1969).

[42] Id. at 25-26.

[43] 321 F.2d 487 (4th Cir. 1963), cert. denied, 376 U.S. 932 (1964).

> Certainly each plaintiff should understand that he was shown much more consideration than a prisoner is legally entitled to ask and receive. The obvious way in which the plaintiffs may assure their right to the free and unfettered practice of their religion in its every detailed teaching and custom is to earn the right to live outside the federal prison.[44]

In another case involving the dietary requirements of the Black Muslims, a slightly different decision was reached. In Barnett v. Rodgers[45] prisoners in the District of Columbia jail brought a suit against the jail administrators because a request for a minimum of one full-course, pork-free meal per day had been denied. The petition went on to plead release from confinement in the absence of compliance inasmuch as the resulting deprivation amounted to cruel and unusual punishment. According to the court the basic issue was "the degree to which officials of the District of Columbia jail are constitutionally compelled to accommodate the dietary laws of the Muslim faith."[46] In reaching a decision the court made two observations concerning limitations on first amendment freedoms. First, it stated that restrictions on such freedoms must be justified on the basis of grave abuses affecting "paramount interest."[47] Second, the court relied on Shelton v. Tucker which held that:

---

[44] Id. at 25-26.

[45] 410 F.2d 995 (D.C. Cir. 1969).

[46] Id. at 997.

> . . . [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.[48]

The court then stated that it could see no reason why the use of pork as seasoning could not be reduced or non-pork-seasoned alternatives be offered. The court also considered the possibility of "providing non-pork substitutes for main dishes of pork."[49] In addition, the judiciary held that it could see no reason why menus showing pork content could not be posted in advance and why pork dishes could not be more evenly dispersed throughout the meal cycle. In conclusion the court stated:

> We do not reach the question whether appellee has violated the Constitution here. We do hold that the District Court erred in dismissing appellants' petitions without determining whether the impediments to

---

[47] Id. at 1000.

[48] Shelton v. Tucker, 364 U.S. 479, 488 (1960).

[49] Barnett v. Rodgers, 410 F.2d 995, 1002 (D.C. Cir. 1969). Of the states responding to the questionnaire, the following states give some consideration to the dietary requirements of Jewish and/or Black Muslim prisoners: Del., Idaho, Ill., Iowa, Me., Minn., Mo., N.H., Wash., and the federal institutions, except the U.S. Army Disciplinary Barracks.

> appellants' observance of their dietary creed have compelling justifications, and whether the governmental purposes and operations responsible for those impediments could feasibly be "pursued by means that [less] broadly stifle fundamental personal liberties.[50]

The implications of this holding go far beyond the mere outlining of the permissable limitations of first amendment freedoms by prison administrators.

Suppression of the Exercise of Religious Beliefs

. While the courts have generally held that restrictions on the exercise of religion which are placed upon all religious groups are allowable as long as such restrictions are reasonable and necessary for the protection and welfare of the prison community,[51] the courts have required a more stringent test when such restrictions are applied to one religious group, but not to others. The test which the courts have applied to such discriminatory actions is the same test which has been applied to restrictions on the first amendment freedoms in the free community--a clear and present danger to the orderly functioning of the institution.[52] The test is applied equally to restrictions on the exercise of religion as well as to prohibiting certain religious literature.[53]

---

[50] Id. at 1003. See text accompanying note 43, Chapter II, supra.

[51] McBride v. McCorkle, 130 A.2d 881, 886-87 (N.J. Sup. 1957).

[52] Banks v. Havener, 234 F. Supp. 27 (E.D. Va. 1964).

The Clear and Present Danger Rule.-This rule was applied to the prison in Banks v. Havener[54] after the Director of the District of Columbia Youth Center at Lorton, Virginia, determined that a riot which had caused injury to several employees and extensive damage to institutional property had been instigated by the Black Muslim group. As a result of this determination, the Director prohibited the practice of the Muslim religion. This action was based, according to testimony by the Director, on a clear and present danger to the security of the institution and because the disruptions had interfered with the rehabilitative processes of the institution. This contention was not accepted by the court which noted that members of other religious groups had participated in the riots but that their religious activities had not been curtailed. It was held that the evidence did not support the contentions of the Director and that:

---

[53] Long v. Parker, 390 F.2d 816 (3rd Cir. 1968). In applying the "clear and present danger" rule of the Third Circuit, a lower court held that the teachings and writings of the Black Muslim leader could be interpreted ". . . as an endorsement of a concept of intense hatred for all whites, who are referred to as 'devils'. Further, these writings and teachings could be interpreted as an endorsement of a concept that whites generally and prison authorities should be defied by Muslim prisoners even when legal orders or demands are made." Knuckles v. Prasse, 302 F. Supp. 1036, 1040 (E.D. Pa. 1969).

[54] 234 F. Supp. 27 (E.D. Va. 1964). The "clear and present danger" rule was first expressed by Justice Holmes in 1919. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 294 U.S. 47, 52 (1919). "I do not doubt for a moment . . . the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent." Abrams v. United States, 250 U.S. 616, 627 (1919).

> The antipathy of the other inmates and the staff, occasioned by the Muslim belief in black supremacy, standing alone is not sufficient to justify the suppression of religious freedom in the Youth Center. . . .[55]

The courts have not been unanimous as to the "clear and present danger" standard. In Sostre v. McGinnis,[56] which was decided in the same year as Banks v. Havener,[57] the court stated:

> We should point out that the practice of any religion, however orthodox its beliefs and however accepted its practices, is subject to strict supervision and extensive limitations in a prison. The principal problem of prison administration is the maintenance of discipline.[58]

Judge Higginbotham, District Judge, Eastern District of Pennsylvania, stated in his opinion in Knuckles v. Prasse that Banks v. Havener was the first to apply the "clear and present danger" test to the prison.[59] He went on to say that since that time there has been a gradual application of that standard to the "prison community." Judge Higginbotham pointed out that he was bound by the test as stated inasmuch as the decision of the Third Circuit Court of Appeals had followed the test in Long v. Parker.[60] However, Judge Higginbotham further stated:

---

[55] Id. at 30. Accord, ". . . Respondent maintains that the potential dangers inherent in permitting the dissemination of their [Black Muslim] beliefs among the prison population warrant the restrictions imposed. While such potential dangers, if realized, may justify the curtailment or withdrawal of petitioner's rights, mere speculation, based upon matters dehors the record, is insufficient to sustain respondent's action." Brown v. McGinnis, 180 N.E.2d 791, 793 (N.Y. 1962). But cf. Desmond v. Blackwell, 235 F. Supp. 246 (M.D. Pa. 1964).

[56] 334 F.2d 906 (2nd Cir.), cert. denied, 379 U.S. 892 (1964).

[57] 234 F. Supp. 27 (E.D. Va. 1964).

[58] 334 F.2d at 908.

> If I were free to formulate a new standard to deal with the realities of the clash between fair and effective prison administration and freedom of religion, at most I might have chosen a "clear and probable danger" standard. For I fear that the clear and present danger test may require prison authorities to engage in brinkmanship, and I do not believe that they should have to go through a catastrophic riot to create a factual record to justify their finding that there was in fact a clear and present danger.[61]

The Test of Reasonableness.-This test was used in a case decided by the Eighth Circuit Court of Appeals.[62] Four prisoners, all white and professing the Christian religion, brought action because they had been denied their constitutional rights to attend religious services in the prison chapel. All four of the petitioners were confined in the maximum security unit of the Nebraska Penal Complex. All four were being held in segregation in the maximum security area not for punishment but because of previous offenses committed while in the general prisoner population. One inmate had been convicted of armed robbery and later, while in prison, of assault upon a prison officer. Another had committed murder three times, once while in prison. The third prisoner had been convicted originally for assault, robbery, and automobile thefts, and while imprisoned, he had been convicted for attempted escape. The fourth petitioner had been convicted of burglary and then assault upon a fellow inmate.[63]

---

[59] 302 F. Supp. at 1056.

[60] Id. Accord, "To justify the prohibition of religious literature, the prison officials must prove that the literature creates a clear and present danger of a breach of prison security or discipline or some other substantial interference with the orderly functioning of the institution." Long v. Parker, 390 F.2d 816, 822 (3rd Cir. 1968). Of the states responding to the questionnaire, the following states allow prisoners to possess copies of the Black Muslim version of the Koran: Ariz., Ark., Cal., Colo., Del., Hawaii, Mo., N.J., N.M., Ohio, Okla., Ore., S.C., Tenn., Tex., Wash., Wis., Wyo., and all the federal institutions. Mont. allows inmates to have copies of the Moslem version of the Koran. The remaining states either refuse inmates permission to have the Black Muslim Koran or request for permission to possess copies have never been received.

[61] Id. at 1057.

Prison administrators admitted that three other prisoners who were confined in the maximum security section were allowed to attend chapel with the general prisoner population. However, the discrimination in treatment was defended on the basis of the past conduct of the four inmates and the additional security measures which would be required for them to attend chapel services. The court acknowledged the well-established precept that freedom of religion is concerned with both the right to believe and the right to exercise. It also acknowledged that the right to exercise one's religion is subject to restrictions. The court then observed that while these "fundamental" rights remain with a prisoner as he enters the prison gates, there are always "appropriate limitations."[64] It held that the test to be applied to the circumstances was "one of reasonableness."[65] Based on this standard, the prior conduct of the prisoners was an appropriate reason for denying them their right to exercise their religion in the prison chapel with the general prisoner population.[66]

---

[62] "The standard is one of reasonableness." Sharp v. Seigler, 408 F.2d 966, 971 (8th Cir. 1969). ". . . [C]orrectional authorities have wide discretion in matters of internal prison administration and . . . reasonable action within the scope of this discretion does not violate a prisoner's constitutional rights." Smith v. Schneckloth, 414 F.2d 680, 681 (9th Cir. 1969).

[63] Id. at 968.

Thus we find, in general, that the courts look upon freedom of religion in prison as a fundamental and preferred freedom. It is universally held that the right to believe is absolute, and this absoluteness follows the individual into prison. However, reasonable restrictions placed upon the exercise of religion are acceptable as long as such restrictions are applied without discrimination. Restrictions placed upon the exercise of certain religions and not others must be subjected to more stringent tests than those restrictions generally applied to the prison population at large. Some courts have applied the "clear and present danger" rule to such selective restrictions. Other courts believe that the standard should fall somewhere between one of "reasonableness" and the "clear and present danger" test.[67] The restrictions and the test applicable thereto apply to religious literature as well as the exercise of religion. The Black Muslims have been generally recognized as a religious group and entitled to all the protections of the first and fourteenth amendments. As long as rules concerning the exercise of religion are reasonable and do not become arbitrary or capricious and are applied without discrimination, the courts will not normally interfere.

---

[64] Id. at 970.

[65] Id. at 971.

[66] Id.

Freedom of Speech

While there have been numerous instances of courts reviewing prison restrictions on the freedom of religion, there have been relatively few cases concerning freedom of speech. Placing large numbers of men who have been adjudged anti-social within the rather narrow confines of a penitentiary requires that verbal communications within the institution be severely restricted. The Texas Department of Corrections prohibits "unnecessary noise" and includes the use of indecent or vulgar language within the definition of the term. Talking to people outside the prison, unless permitted under certain circumstances, is prohibited.[68]

---

[67] See p. 51 *supra*.

Freedom of Speech in Prison May Be Restricted

In Fulwood v. Clemmer[69] the court upheld a prison rule which prohibited demonstrations, strikes, or disturbances which amounted to a breach of the peace. The court found that racial preaching in the prison yard which could be overheard by white inmates and non-Muslim Negro inmates was sufficiently inflammatory to amount to a violation of the prison rule, and appropriate punishment for such speech would not be judicially prevented.[70] While the court did not discuss the status of freedom of speech in prison, it did refer to the narrowly defined and limited classes of speech which can be prevented and for which punishment can be made under the "fighting words" concept of Chaplinsky v. New Hampshire.[71]

Limitations on the Use of the Mail.-Most of the litigation which can be classified as involving freedom of speech concerns complaints of mail censorship or prohibitions against prisoners either sending or receiving mail from certain individuals. In Numer v. Miller,[72] a prisoner complained that his right of free speech had been denied when prison officials refused to mail a part of a correspondence course which contained derogatory information pertaining to the prison administration. The prisoner had enrolled in an English Correspondence course from the University of California. The first assignment required the student to write his reason for taking the course. Numer stated that his reason for taking the course was so that upon his release from prison he could write a book exposing the conditions of the prison. He characterized the prison officials as ". . . a sadistic group in charge of the brutality department."[73] The petitioner complained that he had been denied educational opportunities offered to all other inmates as well as his constitutional right of free speech. The court held that:

---

[68] TEXAS DEP'T OF CORRECTIONS, RULES & REGULATIONS 10-11 (1968).

[69] 206 F. Supp. 370 (1962).

[70] Id. at 378.

[71] "These [words] include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." 315 U.S. 568, 572 (1942).

> . . . As to the asserted violation of constitutional guaranties, a prisoner who persists in abusing a privilege or opportunity extended to all prison inmates is in no position to complain of unequal treatment if the privilege is taken away from him.[74]

Thus, while the petitioner complained of being deprived of his right to free speech, the court refused to consider the action taken by the prison authorities as a deprivation of the petitioner's preferred rights under the first amendment. In addition, it relied on the "hands off doctrine" by stating that the case was not "cognizable by [the] district court."[75]

---

[72] 165 F.2d 986 (9th Cir. 1948).

[73] Id.

[74] Id. at 987.

In another case the "Birdman of Alcatraz"[76] complained that prison officials were depriving him of his right to property and interfering with his business interest by refusing him the right to carry on general business correspondence in connection with attempts to get certain books published. The court rejected the petitioner's contentions that a prisoner had the right to engage in unrestricted general business correspondence.[77] As in the Numer case the court failed to consider the aspect of freedom of speech and relied, to a great extent, on the "hands off doctrine."

The judicial branch has also held that a prisoner has no right to engage in correspondence of a romantic nature.[78] The warden of a federal prison had refused to mail letters of a romantic nature to a female acquaintance of an inmate. In upholding a lower court's refusal to order the warden to mail the letters, the court did not refer to freedom of speech, but relied completely on the

---

[75] Id.

[76] Stroud v. Swope, 187 F.2d 850 (9th Cir.), cert. denied, 342 U.S. 829 (1951).

[77] Id. at 851.

[78] Dayton v. Hunter, 176 F.2d 108 (10th Cir.), cert. denied, 338 U.S. 888 (1949).

"hands off doctrine."[79]

In Ortega v. Ragen[80] a prisoner brought an action under the provisions of the Civil Rights Act of 1871[81] when prison officials refused to deliver to him a letter which allegedly contained information essential to a legal action involving the prisoner's imprisonment. The court held that mail going to and from inmates was subject to prison control as part of the disciplinary procedures. The court stated that the prisoner must show that he had been denied some right guaranteed by either the Constitution or federal law. A similar conclusion was reached in a case where an inmate was denied the privilege of engaging in extensive correspondence involving anti-Semitic propaganda.[82] The court held:

> . . . [E]fforts to express . . . anti-Semitic beliefs in correspondence is clearly subject to the administrative control of prison officials.[83]

The court stated that while a prisoner retains constitutional rights, the necessity of maintaining control and discipline within a prison permits the restriction of these rights as long as such restrictions are not "wholly unwarranted." The court went on to say that inmates should be allowed to write the immediate members of their families, but that such correspondence is subject to censorship.[84]

---

[79] Id. at 109.

[80] 216 F.2d 561 (7th Cir. 1954), cert. denied, 349 U.S. 940 (1955).

[81] 42 U.S.C.A. sec. 1983.

[82] McCloskey v. Maryland, 337 F.2d 72 (4th Cir. 1964).

[83] Id. at 74.

The judicial branch has upheld prison regulations which restrict the number of letters that a prisoner may write.[85] These restrictions are justified by prison authorities as a necessary part of the prison security system.[86] In Ortega v. Ragen[87] the court held that an inmate has no enforceable right to access to the mails. However, if the restrictions on the use of the mail were applied in an arbitrary or discriminatory manner, the judiciary would prohibit such restrictions.[88] According to prison officials, the number of letters that an inmate is permitted to send or receive depends on the number of personnel available to inspect and censor such mail.[89] Although the courts have generally conceded that prison administrators have the authority to censor certain types of mail and to place other restrictions on the use of mail, there have been recent indications that judges may examine such rules and regulations more closely in the future. In Palmigiano v. Travisono[90] a U. S. District Court in Rhode Island issued a temporary injunction which prohibited prison officials of the state from censoring any incoming mail except highly inflammatory writings and hard-core pornography; from inspecting mail from lawyers, courts and high government officials; and from opening, reading or inspecting any outgoing mail without a search warrant.[91] Although the matters complained of--along with other complaints concerning the prison administration--were included in a suit which was pending a hearing before a three-judge panel, the court held that the matters of mail censorship so deeply affected the exercise of the right of free speech that a temporary injunction was necessary.

---

[84] Id. See also Adams v. Ellis, 197 F.2d 483 (5th Cir. 1952). Of the states responding to the questionnaire, the following states inspect all incoming mail: Ariz., Ark., Hawaii, Ill., Iowa, Ky., La., Me., Minn., Mont., Neb., N.H., N.J., N.M., Ohio, Okla., Ore., S.C., S.D., Wash., Wyo., and the federal institutions with the exception of the U.S. Army Disciplinary Barracks. Cal. and Del. do not inspect mail from courts or governmental agencies. Mo., Tenn., Tex., and Wis. do not inspect mail from governmental agencies. The U.S. Army Disciplinary Barracks does not inspect mail from attorneys of record.

[85] Labat v. McKeithen, 243 F. Supp. 662 (E.D. La. 1965).

[86] Barkin, "The Emergence of Correctional Law and the Awareness of the Rights of the Convicted," 45 NEB. L. REV. 669, 678 (1966).

[87] 216 F.2d at 561.

[88] Note, "Judicial Intervention in Prison Administration," 9 WM. & MARY L. REV. 178, 183 (1967).

[89] Note, "The Right of Expression in Prison," 40 SO. CAL. L. REV. 407, 419 (1967).

There is a growing awareness that placing restrictions on mail as a means of punishment and as a rehabilitative tool are detrimental to the overall rehabilitative goal.[92] Some prison psychologists have suggested that if restrictions on mail were eliminated, the amount of mail would not increase appreciably. If an increase should occur, it could be more desireable to increase the number of censors or inspectors rather than limit the prisoners preferred first amendment rights of free speech.[93]

---

[90] 7 Crim. L. Rep. 2481 (D.C.R.I. Aug. 24, 1970).

[91] Id. at 2482-83.

[92] "I find that only limited correspondence restriction is constitutionally justified, because total censorship serves no rational deterrent, rehabilitative or prison security purpose." Id. at 2482.

Rules May Not Be Applied Discriminatorily.-In a case involving discrimination in the application of prison rules concerning allowable reading material, the courts finally breached the question of freedom of speech. In Jackson v. Godwin[94] a prisoner brought suit under the provisions of the Civil Rights Act of 1871, 42 U.S.C.A. section 1983. The petitioner complained that he was not permitted to subscribe to any Negro newspapers or magazines nor did any of the material provided by the prison include any Negro newspapers or magazines although one-half of the prison population was non-white. The defense presented by the prison authorities relied primarily upon the authority granted by state statute to control mail and upon the necessity of controlling mail in order to maintain custody, control, and discipline. In rejecting the contentions of the correctional officials, the court stated that the only distinguishing factor present was that the newspapers and magazines which were prohibited were written by Negroes and presented Negro ideas and views. The court relied primarily on the Equal Protection and Due Process Clauses of the fourteenth amendment to order the even application of rules. However, the judicial branch also referred to the preferred status of the rights outlined in the first amendment. The court applied the principle that where racial discrimination and curtailment of first amendment rights are involved, stringent standards will be applied to determine the justification of any restrictions imposed. To justify such restrictions the state must demonstrate "substantial and controlling interest"[95] before subordinating or limiting "these important constitutional rights."[96] Finally, the court stated:

---

[93] "The Problems of Modern Penology: Prison Life and Prisoner Rights," supra note 25, at 676-77. The rule books of the New Jersey State Prison, the Wyoming State Penitentiary and the U.S. Army Disciplinary Barracks indicate that there are no restrictions placed on the number of letters written by inmates. The rule book of the Illinois State Penitentiary, Menard Branch, indicates that inmates may mail two letters per week. Special letters for business, sickness and death are authorized on an individual basis.

[94] 400 F.2d 529 (5th Cir. 1968).

> On the facts of petitioner's case we find both governmental power and governmental interest in maintaining prison discipline through appropriate rules and regulations, but we find that the governmental interest and application of the regulations here are not unrelated either to the suppression of First Amendment freedoms or to racial discrimination, either designed or in practical effect and result, and neither do we find that the restriction inherent in these regulations and in their application of First Amendment and equal protection rights to be no greater than that which is essential to furtherance of the state's interest in order and discipline.[97]

---

[95] *Id*. at 541.

[96] *Id*.

[97] *Id*. at 542.

Political Thoughts and Expression Are Protected

In Sostre v. Rockefeller[98] a United Stated District Court held that prison officials may not punish a prisoner for his political thoughts and beliefs when there is no threat to prison security. The court enjoined the prison administrators from punishing Sostre for having political literature in his possession or for stating his political beliefs orally or in writing. It stated that punishment for violations of rules involving freedom of speech could be imposed only when such rules were reasonable and after the court had approved the rules as being reasonable. It appears that for the first time a court has elevated freedom of speech within the prison to the preferred status that has already been bestowed upon the right of freedom of religion. If other courts follow the Sostre case, the concept of rejecting total deprivation of rights in favor of those restrictions which less "broadly stifle fundamental personal liberties"[99] will be applied to restrictions on speech among inmates as well as to correspondence to and from them.

While it is obvious that some restrictions on communications among inmates and between them and the "free world" are required[100] for the maintenance of security and the orderly functioning of an institution composed of closely confined humans, it is also apparent that the courts will no longer tolerate the complete deprivation of such a basic right as freedom of speech. If prison officials wish to avoid frequent and continued courtroom confrontations concerning freedom of speech, current rules and regulations governing oral and written prisoner communications must be reviewed with a view toward eliminating those regulations which are unnecessarily restrictive and which do not contribute directly to the security and control of the institution.[101]

---

[98] 309 F. Supp. 611 (S.D.N.Y. 1970).

[99] Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969). See text accompanying note 47, supra.

[100] "The Right of Expression in Prison," supra note 89, at 417.

Right to Petition

The provision that "Congress shall make no law . . . abridging . . . the right . . . to petition the Government for a redress of grievances"[102] includes the right to petition the courts.[103] It is a settled principle that the prisoner has an undeniable right to petition the courts not only to challenge his incarceration, but also to challenge deprivations of his rights by prison officials.[104] It has been in cases where prison officials have interfered with prisoners' rights to have access to the courts that the courts have shown the greatest inclination to review the actions of prison authorities.[105]

---

[101] "We argue for fewer restrictions on letter writing. Letter writing keeps the prisoner in contact with the outside world, helps to hold in check some of the morbidity and hopelessness produced by prison life and isolation, stimulates his more natural and human impulses, and otherwise may make contributions to better mental attitudes and reformation." H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 492 (1959).

[102] U.S. CONST. amend. I.

[103] N.A.A.C.P. v. Button, 371 U.S. 415 (1962). "Rights protected by the First Amendment include advocacy and petition for redress of grievance. . . ." Hackin v. Arizona, 389 U.S. 143 (1967) (Justice Douglas dissenting).

Obstacles Preventing Practical Access to the Courts

The major problem encountered by a prisoner attempting to petition the court is not in establishing his right to do so, but in overcoming secondary obstacles which prevent effective implementation of the right.[106] In one of the leading cases concerning prison administration interference with an inmate's access to the courts, the Court held that a regulation which required that all legal petitions be submitted to the institutional welfare office and then to a state legal investigating officer was invalid.[107] The Court stated:

---

[104] Clemon v. Peyton, 362 F.2d 905 (4th Cir. 1966). ". . . [T]he state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." Ex parte Hull, 312 U.S. 546, 549 (1941). See also Vogelman, "Prison Restrictions-Prisoner Rights," 59 J. CRIM. L.C. & P.S. 386, 393 (1968).

[105] Note, "Constitutional Rights of Prisoners: The Developing Law," 110 U. PA. L. REV. 985, 987 (1962).

[106] "The problem here--as with any 'right' possessed by prisoners--is not with the principle but the implementation." F. COHEN, THE LEGAL CHALLENGE TO CORRECTIONS: IMPLICATIONS FOR MANPOWER AND TRAINING 67 (1969). [Hereinafter cited as LEGAL CHALLENGE TO CORRECTIONS.]

> . . . Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine.[108]

It has also been held that correctional authorities may not impose punishments upon inmates for making false allegations until the court has completed the case. The court's rationale was that to allow for such punishment prior to the court review of the petition would permit prison officials against whom charges have been made to act as both judge and jury.[109]

In Hatfield v. Bailleaux[110] the United States Court of Appeals overturned a lower court ruling which granted injunctive relief to seven inmates of the Oregon State Penitentiary. The decree prevented prison officials from enforcing a prison rule which established detailed restrictions on the use and possession of legal reference material, use of the prison library, and the receipt or dispatch of communications to or from attorneys or court officials by inmates in isolation. In granting the injunction, the lower court found that the regulations did restrict the prisoners' effective access to the courts. However, on review the court of appeals stated:

---

[107] Ex parte Hull, 312 U.S. 546, 548 (1941). Of the states responding to the questionnaire the following states indicated that mail to the courts by inmates is censored: Ariz., Colo., Hawaii, Ill., Iowa, Ky., La., Minn., Neb., N.H., N.M., N.D., Ohio, S.D., Tenn., Tex., and Wyo. Cal. and Wis. indicated that letters to the courts are inspected but not censored. Mo. failed to answer the question and the remaining respondents stated that such mail is not censored.

[108] Id. at 549.

[109] Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962).

[110] 290 F.2d 632 (9th Cir.), cert. denied, 368 U.S. 862 (1961).

> In the context of this case, access to the courts means the opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one's personal liberty, or to assert and sustain a defense therein, and to send and receive communications to and from judges, courts and lawyers concerning such matters. Whether or not in a particular case the access afforded is reasonable depends upon all of the surrounding circumstances.[111]

After examining the regulations and the basis for their implementation, the court held that there was no finding that the appellants had been denied all access to the courts or that such access had been unreasonably delayed.[112]

In the recent case of Sostre v. Rockefeller,[113] a federal district court held that a warden who deleted material, which he considered to be irrelevant to the prisoner's case, from letters written by an inmate to his attorney was a deprivation of the prisoner's right to assistance of counsel. In addition, the prisoner had been placed in punitive segregation as punishment for attempting to mail several handwritten motions to his attorney. While the court did not consider the question of the right to inspect prisoner-attorney mail, it did enjoin the prison officials from censoring such mail or refusing to deliver mail to or from any lawyer.[114]

---

[111] Id. at 637.

[112] Id.

[113] 309 F. Supp. 611 (S.D.N.Y. 1970).

The Prisoner's Right to Legal Assistance

The extent and forms of legal assistance which must be made available to prisoners have not been settled completely by the courts. Legal assistance to the prisoner is normally provided by licensed attorneys, law student interns, or fellow prisoners--normally referred to as "writ-writers" or "jail-house lawyers."[115]

The Right to Communicate with Counsel.-The right to communicate with attorneys presents more problems to the prison administrator than the inmate's right to communicate with the courts.[116] There is a growing contention that mail which passes between lawyer and prisoner should not be subjected to either censorship or inspection because of the confidentiality of the client-attorney relationship.[117] While such practices as photocopying prisoner-attorney communications and forwarding the copies to the state attorney general,[118] prohibiting derogatory remarks about prison officials,[119] or punishing prisoners for comments made to attorneys[120] should not be tolerated, there are valid reasons for inspecting prisoner-lawyer mail. Mail purported to be a communication between a prisoner client and attorney, or vice versa, must be inspected to determine if the attorney is in fact acting in the capacity of a lawyer or a business manager. Also, it has not been unheard of for unscrupulous lawyers to assist clients in the continued operation of an illicit business from prison. A fictitious printed return address could be used to pass unauthorized communications or to introduce contraband into the prison.[121]

---

[114] Id.

[115] Barkin, "Impact of Changing Law Upon Prison Policy," 48 THE PRISON JOURNAL 3, 5-9 (1968); Larsen, "A Prisoner Looks at Writ-Writing," 56 CALIF. L. REV. 343, 348 (1968). Of the states responding to the questionnaire the following states employ attorneys to assist inmates in the preparation of writs and other legal petitions: Ore., S.C., Tex., Wis., the U.S. Penitentiary, Leavenworth, Kan. and the U.S. Army Disciplinary Barracks. The following states reported that inmates may obtain assistance from state public defenders or legal aid societies: Colo., Hawaii, Minn., Ohio and Wyo. The following states indicated that assistance is provided to inmates by student lawyer programs: Ark., Me., and Mont. Neb. stated that an inmate is assigned the task of assisting inmates in the preparation of legal petitions.

[116] "Judicial Intervention in Prison Administration," supra note 88, at 184.

---

[117] "The Emergence of Correctional Law and the Awareness of the Rights of the Convicted," supra note 86, at 675; "The Problems of Modern Penology: Prison Life and Prisoners' Rights," supra note 25, at 678. The following states indicated that letters to attorneys are not censored: Ark., Cal., Del., Idaho, Me., Mont., N.J., Okla., Ore., S.C., S.D., Wash., Wis., Wyo., and all the federal institutions. See also note 84, supra.

[118] Hirschkop & Millemann, "The Unconstitutionality of Prison Life," 55 VA. L. REV. 795, 823 (1969).

[119] The Emergence of Correctional Law and the Awareness of the Rights of the Convicted," supra note 86, at 675.

[120] Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962); In re Ferguson, 361 P.2d 417 (Cal.), cert. denied, 368 U.S. 864 (1961).

While the authority of prison administrators to examine prison-lawyer communications has been recognized, the courts have held that these examinations may not be used to delay such communications.[122] It has also been held that where an inmate is writing to an attorney in an attempt to secure representation, the prison administrators may not prohibit the mailing of the letter because it contains allegations concerning improper conduct of such officials.[123] The court pointed out that if correctional authorities were permitted to prevent an inmate from securing counsel, such prohibitions would in effect be a bar to the prisoner's right to petition the court.[124]

---

[121] "Judicial Intervention in Prison Administration," _supra_ note 88, at 185; "The Emergence of Correctional Law and the Awareness of the Rights of the Convicted," _supra_ note 86, at 675. The Eighth Circuit recently overruled a lower court decision which ordered prison administrators to allow a petitioner unlimited communications with the American Civil Liberties Union. The circuit court modified the lower court's rulings to allow the prison authorities to institute reasonable regulations and restrictions concerning such communications. The court stated, "There is . . . a weighty interest in the security and orderly administration of the internal affairs of the penal institution. Thus, we are led to the conclusion that an inmate of the Missouri Penitentiary should not be given carte blanche mailing privilege, which is the precise effect of the order under attack." _Burns_ v. _Swenson_, 7 Crim. L. Rep. 2479, 2480 (8th Cir. Aug. 31, 1970). See also text accompanying notes 90-91, _supra_.

[122] _In re Ferguson_, 361 P.2d 417 (Cal.), _cert. denied_, 368 U.S. 864 (1961).

[123] _Id_.

[124] _Id_.

In the Bailleaux case the court held that a prison rule which prohibited prisoners who were in punitive segregation from corresponding with attorneys was not invalid.[125] The court based its decision on the short duration of the period of segregation and the reason for punishing the prisoners. Thus, the court implied that had the officials placed the prisoners in segregation for extensive periods of time or placed them into segregation to prevent them from communicating with counsel, such regulations would have denied the inmates their rights.[126]

The Right to Legal Assistance from Fellow Inmates.- While it is well established that an individual is entitled to counsel during his trial and appeal, the incarcerated prisoner has no such right to counsel.[127] The courts have pointed out that the assistance of trained legal counsel is not required to file a writ of habeas corpus. Neither lengthy technical petitions nor numerous case citations are required.[128] Until recently, the judicial branch has refused to acknowledge that many prisoners lack the basic education required to meet even this demand.[129] When remedies are sought under the various civil rights statutes or writs of mandamus are requested, the technical requirements are more severe.[130] It is for these reasons that prisoners turn to "writ-writers" or "jail-house lawyers" for assistance.

---

[125] 290 F.2d at 637-38.

[126] Id. The following states indicated that inmates in punitive segregation are not allowed to correspond with attorneys: La., N.H., N.D., Ohio, Okla. and D.C. Hawaii indicated that such correspondence is permitted only if time is of the essence, and the prisoner must reply to a communication within a specified time.

[127] Ex parte Hull, 312 U.S. 546 (1941). See also THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE TASK FORCE REPORT: COURTS 54 (1967).

[128] Id.

The Supreme Court has established that an illiterate inmate has a right to receive assistance in the preparation of legal petitions from fellow inmates when there is no established system for providing such assistance by other means.[131] Johnson, a prisoner in the Tennessee State Penitentiary, was placed in disciplinary segregation for violating a prison rule which stated, "No inmate will advise, assist or otherwise contract to aid another, either with or without a fee, to prepare writs or other legal matter."[132] To obtain his release from segregation, Johnson was required to promise that he would not provide assistance to other inmates. The district court held that the regulation was invalid in that illiterate prisoners were denied access to federal habeas corpus.[133] The Sixth Circuit Court of Appeals ruled that although a prisoner might be illiterate, he had no right to the services of a "jail-house lawyer."[134] It based its reversal on the premise that a prisoner's right to access to the courts was secondary to the regulation of the practice of law by a state.[135] In affirming the decision of the district court in Avery v. Johnson, the Supreme Court held that in the absence of other sources of aid, a regulation which prohibited an illiterate from obtaining assistance from another inmate in effect denied that prisoner his right to have access to the courts.[136]

---

[129] Krause, "A Lawyer Looks at Writ-Writing," 56 CALIF. L. REV. 371, 374 (1968). "In so far as federal habeas corpus proceedings are concerned, indigent state prisoners are not entitled to court appointed counsel unless under the circumstances of the particular case this is required to attain due process of law." Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), cert. denied, 368 U.S. 862 (1961).

[130] "A Prisoner Looks at Writ-Writing," supra note 115, at 352.

[131] Johnson v. Avery, 393 U.S. 483 (1969).

[132] Id. at 484.

While the Court specifically discussed illiterates in the Johnson case, the Fifth Circuit Court of Appeals included other prisoners within the protections outlined in the Johnson decision. An inmate in a Florida prison was punished for violating a rule which limited prisoners to providing legal assistance to illiterate prisoners. In following the Johnson decision the court held that the rule was invalid in that illiterate prisoners were not the only prisoners who required assistance in the preparation of writs.[137] A U. S. District Court has been even more specific as to what assistance one prisoner may provide to another inmate. In Sostre v. Rockefeller the court held that:

---

[133] Johnson v. Avery, 252 F. Supp. 783 (M.D. Tenn. 1966).

[134] Johnson v. Avery, 382 F.2d 353 (6th Cir. 1967). Contra. Arey v. Peyton, 378 F.2d 930 (4th Cir. 1967).

[135] Id.

[136] Johnson v. Avery, 393 U.S. 483 (1969). The following states indicated that inmates are not allowed to assist other inmates in the preparation of writs and petitions: Okla., Tex., Wis. and Wyo. Wash. requires inmates to obtain written permission prior to giving legal assistance to other inmates.

> Defendants [prison warden and other administrators] will . . . be permanently enjoined from punishing Sostre for sharing with other inmates his law books, law reviews, and other legal materials, and from refusing to permit Sostre to assist any other inmate in any legal matter as long as defendants have not provided any alternative means of legal assistance for such inmates.[138]

The court also enjoined the administrators from prohibiting Sostre from having in his possession other prisoners' letters pertaining to legal matters when such inmates had requested assistance from Sostre in translating the letters into English.[139]

The traditional arguments presented by prison administrators against the activities of "jail-house lawyers" have been based on the undesirable practice of one inmate becoming indebted to another. These administrators point out that prison discipline and control are subverted when certain inmates are allowed to gain control of the loyalty of weaker and less-educated prisoners.[140] Lawyers have argued that assistance provided by non-lawyers results in inmates receiving poor legal advice and assistance.[141] Mr. Justice White concurred in this concept in his dissenting opinion in the Johnson case.[142] He stated:

---

[137] Wainwright v. Coonts, 409 F.2d 1337 (5th Cir. 1969).

[138] 309 F. Supp. at 613.

[139] Id.

[140] Hatfield v. Bailleaux, 290 F.2d 632, 639 (9th Cir.), cert denied, 368 U.S. 862 (1961). "The prison

> It cannot be expected that the petitions which emerge from such a process [assistance by "jail-house lawyers"] will be of the highest quality. Codes of ethics, champerty, and maintenance, frequently have little meaning to the jailhouse lawyer, who solicits business vigorously as he can . . . .
>
> . . . They [inmates] need help, but I doubt that the problem of the indigent convict will be solved by subjecting him to the false hopes, dominance, and inept representation of the average unsupervised jailhouse lawyer.[143]

The courts have already pointed out that the alternative to permitting prisoners to assist each other in the preparation of writs lies in offering some other method of assistance.[144] In Beard v. Alabama Board of Corrections

---

administrators have traditionally fought any activity which would place one inmate in the debt of another for reasons which are obvious." "The Emergence of Correctional Law and the Awareness of the Rights of the convicted," supra note 86, at 680. "Payment can take any of the following forms: commissary goods, such as candy, cigarettes and food; clothing; or a homosexual relationship. Not all 'payments' are due at the prison. The 'understanding' may require some pay-off when the debtor-inmate is paroled or discharged, or he may be expected to arrange for payment while visiting with his family." Spector, "A Prison Librarian Looks at Writ-Writing," 56 CALIF. L. REV. 365 (1968).

[141] "The Problems of Modern Penology: Prison Life and Prisoners' Rights," supra note 25, at 680.

[142] 393 U.S. at 498.

[143] Id. at 500-01.

[144] "Even in the absence of such alternatives, the State may impose reasonable restrictions and restraints upon the acknowleged propensity of prisoners to abuse both the giving and seeking of assistance in the preparation of

the court stated:[145]

> . . . A regulation prohibiting the granting of assistance altogether might well be sustained if the state were to make available a sufficient number of qualified attorneys or other persons capable and willing to render voluntary assistance in the preparation of petitions for habeas corpus relief.[146]

Although prison officials may not prevent inmates from assisting each other in the preparation of legal petitions when no other assistance is available, prison officials may still enforce reasonable regulations governing such activity.[147] In a recent California case three prisoners complained that they had been deprived of their rights under Johnson v. Avery. They complained of a prison rule which prohibited one prisoner from possessing the legal papers of another inmate. One of the prisoners, who had been providing assistance to other inmates, complained that he had been prevented from filing petitions for other prisoners; that he had been prohibited from corresponding with inmate "clients" in other institutions; that he had been prohibited from interviewing prisoners in isolation; and that he had been prohibited from reviewing disciplinary records of inmates whom he was assisting. The court held

---

applications for relief: for example, by limitations on the time and location of such activities and the imposition of punishment for the giving or receipt of consideration in connection with such activities." Id. at 490.

[145] 413 F.2d 455 (5th Cir. 1969).

[146] Id. at 457.

[147] In re Harrell, 7 Crim. L. Rep. 2277 (Cal. June 18, 1970).

that the rule prohibiting one inmate from possessing the legal papers of another inmate effectively prohibited a prisoner from receiving legal assistance in preparing petitions. However, it was decided that the Johnson case was concerned with one inmate assisting another and did not give a prisoner the right to provide legal representation to other inmates. Based on that premise, the court denied further relief.[148]

The Prisoner's Right to Legal Reference Material

Other obstacles that have inhibited the prisoner's right to have access to the courts have been the lack of legal reference material in prison libraries, restrictions on the use of legal materials that are available, and prohibitions against inmates maintaining personal legal references in their living areas.[149] When coupled with the general lack of legal assistance, the inability to obtain access to legal references has placed an even greater restriction on prisoners' practical access to the courts.[150]

---

[148] Id.

[149] M. Cohen, "Reading Law in Prison," 48 THE PRISON JOURNAL 21 (1968). All respondents, with the exception of Ark., indicated that some legal reference materials are available for inmate use. Me. indicated that only a limited amount was available. The following states do not permit inmates to retain legal reference material in their cells or living areas: Ariz., La., Neb., Okla., S.D., Tenn., Tex., and Wash.

[150] F. COHEN, LEGAL CHALLENGE TO CORRECTIONS 70-71 (1969).

In reviewing the rules of the Oregon State Prison which placed various restrictions on the possession and use of legal materials, the Ninth Circuit Court of Appeals held that it would not interfere provided such rules were established for a reasonable purpose and not to prevent prisoners from obtaining access to the courts, and provided such rules were not applied discriminately.[151] Prohibitions against prisoners purchasing bound legal books were upheld on the basis of limited library facilities and library personnel. Prisoners could purchase copies of individual cases and excerpts from statute books as long as such purchases were made directly from the publisher or government agency. This rule was justified because of the burden of having to inspect all material coming from other sources. Prisoners who were a part of the general prisoner population were not permitted to retain any legal material in their cells nor were they permitted to engage in the study of law or the preparation of legal petitions while in their cells. All legal work was restricted to the prison library, and any legal material found outside the library was confiscated. The justification for this rule was the desirability of discouraging "cell-house lawyers."[152] (In view of the decision of Johnson v. Avery, it could be assumed that

---

[151] Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), cert. denied, 368 U.S. 862 (1961).

[152] Id. at 639.

FILMED FROM BEST AVAILABLE COPY

regulations designed to discourage "cell-house lawyers" would no longer be valid unless such regulations could be justified on other grounds.) Prisoners who were confined in segregation were permitted to have legal materials in their cells inasmuch as they were not permitted to utilize the library. The court went on to say that the state was under no obligation to provide either extensive law library facilities or the opportunity to become sufficiently proficient in the field of law to enable a prisoner to discover "legal loopholes" in his conviction.[153]

In Roberts v. Papersack, the court held that:

> The right to petition or correspond with the court does not include the right to be furnished with an extensive collection of legal materials. Such a collection will encourage "fishing expeditions" in which an inmate seeks out cases where the allegations may receive favorable consideration and adopts those allegations as his own.[154]

The unsettled state of the law in regard to prisoner access to legal materials was illustrated in a recent California case. A suit was brought under the fourteenth amendment by 89 inmates of the California State Prison at San Quentin. The suit complained of regulations concerning the contents of the prison law library and the future policy concerning the possession of law books and court reports by prisoners. The prisoners complained that they had been deprived of their right to access to the courts, and that indigent inmates were being discriminated against as affluent prisoners could obtain legal counsel for the purposes of legal research.[155] In overturning the lower court's refusal to convene a three-judge court, the Ninth Circuit Court of Appeals stated:

---

[153] Id.

[154] 256 F. Supp. 415, 433, (D.Md. 1966).

> . . . Courts are currently struggling with the question of the extent of a prisoner's rights to have access to legal materials, e.g., our opinion in Hatfield v. Bailleaux. . . . The Supreme Court has not yet spoken on the subject and the law can hardly be said to be settled.[156]

Alternatives to Courtroom Confrontations

The repudiation of the "hands off doctrine" by the courts and the few successful prisoner petitions which have challenged both prison rules and authority have been responsible for the ever-increasing number of prisoner petitions complaining not of unlawful or wrongful imprisonment but of denial of constitutional rights while confined. While it is obvious that prison administrators must be permitted considerable discretionary authority, it is also evident that some officials rely on this authority to retain prison rules which have outlived their original purpose. When these rules are challenged in the courts by inmates, many correctional officials defend their actions on the basis of discretionary authority and the need for complete control of prisoners, rather than on the basis of the necessity of the rule.

---

[155] Gilmore v. Lynch, 400 F.2d 228 (9th Cir. 1968).

[156] Id. at 230.

If prison authorities wish to preclude an ever-increasing number of courtroom confrontations with their charges, at least two affirmative actions are required. First, definitive policies outlining administrative procedures to be followed by officials when making decisions affecting the status of the prisoner must be made and implemented. Second, a process which will permit prisoners to submit complaints concerning their treatment must be established. For this complaint system to accomplish its goal of eliminating some of the petitions made by prisoners to the courts, the system must gain the confidence of the inmates.

The Establishment of Written Policies

The need for establishing comprehensive written policy directives has not been recognized by many prison administrators.[157] If the objective of correctional systems is to rehabilitate convicted felons rather than to extract society's pound of retribution, then the concept that prisoners are entitled to certain rights is not antithetical to the goals of the correctional system.

While many of the decisions involving the inmate's future depend on the value judgement of the prison official, there is no reason that the factors upon which the value judgement is made cannot be revealed to the prisoner. In fact, to keep such information secret is probably detrimental to the rehabilitative goal. Inasmuch as many of the decisions made by prison authorities determine either the length of time that an inmate remains in prison or the conditions under which he serves his sentence, it is imperative that well-defined policies concerning these decisions be developed, implemented and publicized.[158]

---

[157] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE TASK FORCE REPORT: CORRECTIONS 82-83 (1967).

Not only must policies concerning the treatment of prisoners be established, but the rules governing the lives of the inmates must be reviewed continually to insure that the reasons for the rules are still valid. As the prison system becomes more concerned with rehabilitation than with custody, the need for certain rules designed to insure security must be reviewed. This idea has been aptly stated by the Task Force Report: Corrections:

> . . . [U]nder conditions of mass treatment and great concern for custody there is a tendency to accumulate numerous restrictions on inmate behavior. Each disturbance inspires an attempt to prevent its recurrence by establishing a new rule. Once established, rules have great success at survival. Rarely is there any systematic review that looks at the elimination of unnecessary restrictions.[159]

---

[158] The need for well-defined policies for police departments has been recognized. "Like all military and semimilitary organizations, a police agency is governed in its internal management by a large number of standard operating procedures. . . ." THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE TASK FORCE REPORT: POLICE 16 (1967).

[159] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE TASK FORCE REPORT: CORRECTIONS 50 (1967).

The Establishment of a Complaint Process

Although definitive written policies are necessary to the operation of a quasi-military organization such as a police department or a prison system, the presence of a viable system for the submission of complaints by inmates is essential if such complaints are to be kept out of the courtroom. There are several possible solutions to the problem of determining the validity of prisoners' complaints.

Chief Justice Burger has pointed to the system used by Holland as a possible solution. This process involves the use of a team of trained personnel from the Ministry of Justice who make regular visits to the various penal institutions to hear the complaints of inmates. These personnel have a background in law, psychology, and counseling. Cases which appear to have some merit are referred to the Minister of Justice for final disposition.[160] As Chief Justice Burger stated:

> In a sense these trained teams are like bank examiners, or health inspectors. Their method provides a regular avenue of communication designed to flush out the case of miscarriage of justice and the larger number of cases in which the prisoner has some valid complaint or deserves re-examination of his sentence. The mere existence of such an avenue of communication exercises a very beneficial influence which is in many respects far superior to our habeas corpus process.[161]

---

[160] Burger, "Post Conviction Remedies: Eliminating Federal-State Friction," 61 J. CRIM. L.C. & P.S. 148, 150 (1970).

[161] _Id_. at 150.

Norval Morris has pointed to the Swedish concept that a prisoner remains a citizen and is therefore entitled to respect and adequate treatment. Prisoners are entitled to make complaints to the Ombudsman, and such complaints receive considerable attention by the Swedish press and the general citizenry.[162] This concept could provide an alternative to the increasing number of prisoner complaints being submitted to the courts. However, as in Sweden, the officer appointed must have sufficient rank and authority so that valid complaints can be settled quickly.[163] Such a program could obtain the confidence of the inmates thus eliminating the need of many courtroom contests.

Another proposed solution to the problem is the establishment of a commission, independent of the prison system, for the purpose of investigating complaints of prisoners.[164] Such a commission would consist of persons trained in the field of corrections and would be empowered to recommend or order changes in rules and policies. When necessary, the commission would be empowered to grant relief to prisoners who had been mistreated or deprived of their constitutional rights.[165]

---

[162] Morris, "Lessons From the Adult Correctional System of Sweden," 30 FED. PROB. 3, 5 (1966).

[163] Id.

[164] "The Problems of Modern Penology: Prison Life and Prisoners' Rights," supra note 25, at 705.

[165] Id. at 706.

The appointment of a Prison Inspector is another possible solution to the problem of increasing petitions by inmates. Such an official would be appointed by the correctional system director and would be answerable to the director. The inspector would be charged with inspecting all functions and units of the system to determine the condition of facilities, the degree to which the rehabilitative goals of the various units of the system were being accomplished, and to insure that prisoners were receiving proper treatment. The second major function of the Prison Inspector would be to hear and investigate complaints of prisoners and present his findings and recommendations to the director of the correctional system.

Any system established to screen complaints of prisoners could not be effective without the confidence of the inmates. Even though such a system gained the acceptance of the general prisoner population, prisoners would still petition the courts concerning deprivation of rights and mistreatment. However, the courts would be less likely to become deeply involved in reviewing the decisions of correctional administrators where an adequate system for reviewing the complaints of prisoners existed.

The review and elimination of rules which unnecessarily restrict the rights of inmates and the establishment of a system for reviewing and investigating the complaints of prisoners would reduce some of the burden which has been placed on the courts by the ever-increasing number of prisoner petitions. Also, prison administrators would not be required to continually defend their policies and decisions before the courts. More important, the rehabilitative goal of the correctional system would not be hindered by unnecessary restrictions on the rights of prisoners.

Summary

This chapter has reviewed prisoners' first amendment rights of religion, speech and petition and the current position of the courts in regard to restrictions placed upon these rights by prison administrators. It is apparent that the courts, with ever-increasing frequency, have begun to review prison regulations and policies which deprive inmates of constitutional rights. The courts have made it clear that any regulation or policy which restricts or suppresses the preferred freedoms of the first amendment will be subjected to close judicial scrutiny. The courts have held that regulations which place restrictions on these preferred rights must be reasonable, and such regulations must be implemented impartially. In cases where these freedoms are completely suppressed or restrictions are applied on a discriminatory basis, the standard to be used will be more severe. Although the question has not reached the Supreme Court, some courts have held that the suppression of rights or the discriminate application of restrictions must be necessitated by a clear and present danger to the security of the prison. At least one court has held that restrictions placed on the exercise of freedoms are invalid if less restrictive alternatives are available.

It has been established that prisoners have an absolute right to any religious belief. However, the exercise of religious beliefs may be subjected to reasonable restrictions. Although verbal communications within the prison may be severely restricted, and written communications may be subjected to both censorship and inspection, there is a growing awareness that restrictions on mail are detrimental to the rehabilitative ideal. While it has been held that an inmate has an absolute right to petition the courts, restrictions which may be placed upon activities considered necessary to the preparation of such petitions have not been fully delineated by the courts.

In Jackson v. Godwin the court very aptly stated the reason for the growing concern of the courts as to the reasonableness of prison rules and the judiciousness of the application of these rules by prison officials and personnel:

> [P]rison regulations are designed to teach the prisoners to live in conformity with the norms of society, the sporadic and discretionary enforcements of unreasonable regulations . . . is more likely to breed contempt of law than respect for, and obedience to it. Unrestricted, arbitrary and unlawful treatment of prisoners would eventually discourage prisoners from cooperating in their rehabilitation.[166]

---

[166] 400 F.2d at 535.

CHAPTER IV

SUMMARY AND CONCLUSIONS

The goal of this study was to review the increasing propensity of the courts to intervene in the administration of correctional institutions; to ascertain the remedies available to prisoners when basic rights are unnecessarily withdrawn; to examine the allowable restrictions which may be placed on the exercise of the fundamental rights of religion, speech, and petition; and to determine what alternatives, other than courtroom confrontations, are available to the criminal justice and correctional systems.

Traditionally the courts have refused to review the regulations or decisions of prison administrators so long as prisoners were provided the basic necessities required to survive. This judicial reluctance was based upon society's demand for retribution, the reluctance of the judiciary to introduce possible impediments into the correctional process, and the concept of the separation of judicial and executive functions of government. It was not until the last decade that the judiciary began to exhibit an interest in prisoners' rights. Although the majority of the prisoners petitioning the courts did not obtain the desired relief, it was significant that the courts began to hear the merits of the complaints rather than arbitrarily dismissing the petitions.

During the early 1960's the courts began to reject the concept that all rights are withdrawn upon incarceration and adopted the philosophy that a prisoner retains all rights of the citizen except those expressly withdrawn by statute and by implication. By the end of the decade, the judiciary generally held that judicial intervention was required when prison authorities abused their discretion, applied rules discriminately, or suppressed constitutional rights.

The most effective remedies available to prisoners whose rights have been unnecessarily restricted have been limited, to some extent, by the traditional restrictions placed upon the use of the "Great Writ." The Civil Rights Act of 1871 has provided state prisoners their most effective means of petitioning the courts when their constitutional or statutory rights have been unnecessarily restricted by state officials. Requests for writs of mandamus have been successfully applied for in several instances where rights have been suppressed. Prisoners' petitions seeking relief and based upon one of these remedies have been responsible for the increasing frequency of judicial intervention into the administration of correctional systems.

The judicial branch has been most willing to listen to petitions which complain of restrictions on first amendment freedoms of speech, religion, and petition because of the preferred status of these rights. The courts have generally held that regulations which place restrictions on these preferred rights must be reasonable, and such regulations must be implemented without discrimination. Additionally, the judiciary has stated when such preferred freedoms are completely suppressed, the standard used to judge such action will be greater than one of "reasonableness." Although the question has not reached the Supreme Court, some courts have held that when first amendment rights are suppressed or restrictions are applied discriminatorily prison authorities must show such actions to be necessary because of a clear and present danger to the prison facility. At least one court has prohibited prison authorities from placing restrictions on the exercise of first amendment freedoms when less suppressive measures were available.

It has been well established that prisoners have an absolute right to any religious belief. However, the courts have generally upheld reasonable restrictions on religious practices. When restrictions placed upon one religion are more severe than those placed upon another, some courts have held that such restrictions are justified only when there is a clear and present danger to the penal institution. Others have expressed a preference for a standard which falls somewhere between "reasonableness" and "clear and present danger." Generally, however, the courts have held that so long as regulations governing the exercise of religion are reasonable and are not applied discriminatorily, the courts will not interfere.

The courts have generally upheld reasonable restrictions placed upon the exercise of free speech by prisoners. The judiciary has generally considered the need for maintaining control over a large number of men who are being detained against their will. Only recently have the courts considered the effects of such rules on the exercise of a constitutional right. Regulations restricting the amounts and types of mail an inmate can send or receive are common in most prison systems. Except for communications concerning legal matters, the courts have generally sanctioned rules providing for censorship of both incoming and outgoing mail. Because of the so-called "new penology," the courts have begun to look more closely at regulations which restrict prisoners' rights to free speech. Also, there is evidence that restrictions have a negative effect on rehabilitative goals and contribute little to the security of the institutions.

The courts have been quite willing to hear complaints of prisoners when the alleged deprivation concerns the rights of the inmate to petition the courts. Although it has been established that inmates have a right to petition the courts, many prison regulations have been found to interfere with the right of petition. Correctional authorities may not delete material which is derogatory to them from prisoners' letters to courts or to their attorneys. The Supreme Court has established the right of prisoners to assistance in the preparation of writs. Furthermore, when such assistance is not provided by institution authorities, rules prohibiting one inmate from assisting another are invalid. The courts have generally held that prisoners have a right of access to legal reference materials, but the institution is not required to furnish such materials. However, rules concerning the possession of legal reference materials have been upheld as long as such rules serve a purpose and are not used to discourage prisoner petitions to the courts. The Supreme Court has not considered a case involving prisoners' rights to have legal materials; the law on this point is not considered settled.

The ever-increasing number of prisoner petitions complaining of deprivation of rights has established an urgent need for alternatives to courtroom confrontations involving prisoners and prison administrators. Such petitions have contributed to the clogging of court dockets, have provided the basis for increased judicial intervention into the administration of prisons, and have entangled prison administrators in time-consuming court contests. To reduce these problems, written policies must be designed and implemented, and a system for hearing prisoner complaints concerning institution rules and policies must be established.

In cases where the judiciary determines hearings concerning prisoners' complaints are required, prison officials must be prepared to defend their policies and decisions on some basis other than administrative discretion.

These officials must insure that when such policies and decisions are defended on the basis of security and control, there is a logical basis to support the argument. The courts have indicated that unsupported predictions concerning detrimental effects on security and control will not be accepted.

Each correctional system or facility must establish a formal system for reviewing all rules and regulations to insure that the need for individual rules still exists. Rules which no longer serve a validated purpose must be eliminated.

Prison authorities must establish a system for reviewing prisoner complaints which will provide prompt relief to prisoners with valid complaints and identify prisoners with frivolous ones.

The courts have abandoned their traditional "hands off" policy and will review complaints of prisoners with increasing frequency. This increasing judicial intervention into prison administration may result in the courts establishing rigid guidelines for correctional authorities to follow unless these authorities provide adequate safeguards for prisoner rights.

BIBLIOGRAPHY

BIBLIOGRAPHY

A. BOOKS

Barnes, Harry E. and Nedgley K. Teeters. *New Horizons in Criminology*. Englewood Cliffs, New Jersey: Prentice-Hall, 1959.

Beaumont, de Gustave and Alexis de Tocqueville. *On The Penitentiary System in the United States*. Philadelphia: Carey, Lea and Blanchard, 1833.

Cohen, Fred. *The Legal Challenge To Corrections: Implications For Manpower And Training*. A consultant's paper prepared for the Joint Commission on Correctional Manpower and Training. Washington, D. C.: Joint Commission on Correctional Manpower and Training, 1969.

Editors of the Criminal Law Reporter. *The Criminal Law Revolution*. Washington, D. C.: The Bureau of National Affairs, Inc., 1969.

Fox, Vernon. *Violence Behind Bars*. New York: Vantage Press, 1956.

Menninger, Karl. *The Crime of Punishment*. New York: The Viking Press, 1966.

Rubin, Sol. *The Law of Criminal Corrections*. St. Paul, Minnesota: West Publishing Company, 1963.

Shapiro, Martin. *Freedom of Speech: The Supreme Court and Judicial Review*. Englewood Cliffs, New Jersey: Prentice-Hall, 1966.

B. JOURNALS

Barkin, Eugene N. "The Emergence of Correctional Law and the Awareness of the Rights of the Convicted." *Nebraska Law Review*, 45 (January 1966), 669-89.

________. "Impact of Changing Law Upon Prison Policy." *The Prison Journal*, 48 (Spring-Summer 1968), 3-20.

Burger, Warren E. "Post Conviction Remedies: Eliminating Federal-State Friction." *Journal of Criminal Law, Criminology and Police Science*, 61 (June 1970), 148-51.

Cohen, Morris L. "Reading Law in Prison." *The Prison Journal*, 48 (Spring-Summer 1968), 21-27.

Gallington, Daniel J. "Prison Disciplinary Decisions." *Journal of Criminal Law, Criminology and Police Science*, 60 (June 1969), 152-64.

Hirschkop, Philip J. and Michael A. Millemann. "The Unconstitutionality of Prison Life." *Virginia Law Review*, 55 (June 1969), 795-839.

Kimball, Edward L. and Donald J. Newman. "Judicial Intervention in Correctional Decisions: Threat and Response." *Crime and Delinquency*, 14 (January 1968), 1-13.

King, Daniel P. "Religious Freedom in the Correctional Institution." *Journal of Criminal Law, Criminology and Police Science*, 60 (September 1969), 299-305.

Krause, Marshall W. "A Lawyer Looks At Writ-Writing." *California Law Review*, 56 (April 1968), 371-77.

Larsen, Charles. "A Prisoner Looks At Writ-Writing." *California Law Review*, 56 (April 1968), 343-64.

Morris, Norval. "Lessons From the Adult Correctional System of Sweden." *Federal Probation*, 30 (December 1966), 3-13.

Note. "Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts." *Yale Law Journal*, 72 (January 1963), 506-58.

_________. "Constitutional Rights of Prisoners: The Developing Law." *University of Pennsylvania Law Review*, 110 (December 1962), 985-1008.

_________. "Judicial Intervention in Prison Administration." *William and Mary Law Review*, 9 (Fall 1967), 178-92.

_________. "Prisoners' Rights Under Section 1983." *The Georgetown Law Journal*, 57 (June 1969), 1270-98.

_________. "The Problems of Modern Penology: Prison Life and Prisoners' Rights." *Iowa Law Review*, 53 (December 1967), 671-709.

_________. "The Right of Expression in Prison." *Southern California Law Review*, 40 (June 1967), 407-23.

Packer, Herbert L. "The Courts, The Police and The Rest of Us." *Journal of Criminal Law, Criminology and Police Science*, 57 (September, 1966), 238-43.

Rubin, Sol. "The Administrative Response to Court Decisions." Crime and Delinquency, 15 (July, 1969), 377-86.

Spector, Herman C. "A Prison Librarian Looks At Writ-Writing." California Law Review, 56 (April 1968), 365-70.

Tappan, Paul W. "The Legal Rights of Prisoners." The Annals of The American Academy of Political and Social Science, 293 (May 1954), 99-111.

Vogelman, Richard P. "Prison Restrictions-Prisoner Rights." Journal of Criminal Law, Criminology and Police Science, 59 (September 1968), 386-96.

C. MISCELIANEOUS

American Correctional Association. Manual of Correctional Standards. New York: The American Correctional Association, 1966.

Black, Henry Campbell. Black's Law Dictionary. 3rd ed. St. Paul, Minnesota: West Publishing Company, 1933.

Houston Chronicle, August 14, 1970.

President's Commission on Law Enforcement and Administration of Justice. Task Force Report: Corrections. Washington: United States Government Printing Office, 1967.

________. Task Force Report: Courts. Washington: United States Government Printing Office, 1967.

________. Task Force Report: Police. Washington: United States Government Printing Office, 1967.

Texas Department of Corrections. "Rules and Regulations." Huntsville, Texas, 1968. (Mimeographed.)

United States Code. Vol. 28, section 1361.

United States Code. Vol. 28, section 2254.

United States Code. Vol. 42, section 1983.

United States Code Annotated. Vol. 18, section 4001.

U. S. Constitution, Amendment I.

D. TABLE OF CASES

Abrams v. *United States*, 250 U.S. 616 (1919).

Adams v. *Ellis*, 197 F.2d 483 (5th Cir. 1952).

Arey v. *Peyton*, 378 F.2d 930 (4th Cir. 1967).

Banks v. *Havener*, 234 F. Supp. 27 (E.D. Va. 1964).

Banning v. *Looney*, 213 F.2d 771 (10th Cir.), *cert. denied*, 341 U.S. 859 (1954).

Barnett v. *Rodgers*, 410 F.2d 995 (D.C. Cir. 1969).

Beard v. *Alabama Board of Corrections*, 413 F.2d 455 (5th Cir. 1969).

Bethea v. *Crouse*, 417 F.2d 504 (10th Cir. 1969).

Brown v. *McGinnis*, 180 N.E.2d 791 (N.Y. 1962).

Burns v. *Swenson*, 7 Crim. L. Rep. 2479 (8th Cir. Aug. 31, 1970).

Cantwell v. *Connecticut*, 310 U.S. 296 (1940).

Chaplinsky v. *New Hampshire*, 315 U.S. 568 (1942).

Childs v. *Pegelow*, 321 F.2d 487 (4th Cir. 1963), *cert. denied*, 376 U.S. 932 (1964).

Clemon v. *Peyton*, 362 F.2d 905 (4th Cir. 1966).

Coffin v. *Reichard*, 143 F.2d 443 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945).

Cooper v. *Pate*, 378 U.S. 546 (1963), *per curiam*.

Dayton v. *Hunter*, 176 F.2d 108, (10th Cir.), *cert. denied*, 338 U.S. 888 (1949).

Desmond v. *Blackwell*, 235 F. Supp. 246 (M.D. Pa. 1964).

Everson v. *Board of Education*, 330 U.S. 1 (1947).

Escobedo v. *Illinois*, 378 U.S. 478 (1964).

In re Ferguson, 361 P.2d 417 (Cal.), *cert. denied*, 368 U.S. 864 (1961).

Fulwood v. *Clemmer*, 206 F. Supp. 370 (D.D.C. 1962).

Gideon v. *Wainwright*, 372 U.S. 335 (1963).

Gilmore v. *Lynch*, 400 F.2d 228 (9th Cir. 1968).

Gitlow v. *New York*, 268 U.S. 652 (1925).

Green v. *United States*, 283 F.2d 687 (3rd Cir. 1960).

Hackin v. *Arizona*, 389 U.S. 143 (1967).

In re Harrell, 7 Crim. L. Rep. 2277 (Cal. June 18, 1970).

Hatfield v. *Bailleaux*, 290 F.2d 632 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961).

Ex parte Hull, 312 U.S. 546 (1941).

Jackson v. *Godwin*, 400 F.2d 529 (5th Cir. 1968).

Johnson v. *Avery*, 393 U.S. 483 (1969).

Johnson v. *Avery*, 382 F.2d 353 (6th Cir. 1967).

Johnson v. *Avery*, 252 F. Supp. 783 (M.D. Tenn. 1966).

Knuckles v. *Prasse*, 302 F. Supp. 1036 (E.D. Pa. 1969).

Kritsky v. *McGinnis*, 7 Crim. L. Rep. 2310 (N.D.N.Y. June 12, 1970).

Labat v. *McKeithen*, 243 F. Supp. 662 (E.D. La. 1965).

Long v. *Parker*, 390 F.2d 816 (3rd Cir. 1968).

Mapp v. *Ohio*, 376 U.S. 643 (1961).

McBride v. *McCorkle*, 130 A.2d 881 (N.J. Sup. 1957).

McCloskey v. *Maryland*, 337 F.2d 72 (4th Cir. 1964).

Murdock v. *Pennsylvania*, 319 U.S. 105 (1943).

N.A.A.C.P. v. *Button*, 371 U.S. 415 (1962).

Numer v. *Miller*, 165 F.2d 986 (9th Cir. 1948).

Ortega v. *Ragen*, 216 F.2d 561 (7th Cir. 1954), *cert. denied*, 349 U.S. 940 (1955).

Palmigiano v. *Travisono*, 7 Crim. L. Rep. 2481 (D.C.R.I. Aug. 24, 1970).

Pierce v. *Lavallee*, 212 F. Supp. 865 (N.D.N.Y. 1962).

Price v. *Johnston*, 334 U.S. 266 (1948).

Reynolds v. *United States*, 25 L.Ed. 244 (1878).

Roberts v. *Papersack*, 256 F. Supp. 415 (D. Md. 1966).

Ruffin v. *Commonwealth*, 62 Va. (21 Gratt.) 790 (1891).

Schenck v. *United States*, 249 U.S. 47 (1919).

Sewell v. *Pegelow*, 291 F.2d 196 (4th Cir. 1961).

Sharp v. *Seigler*, 408 F.2d 966 (8th Cir. 1969).

Shelton v. *Tucker*, 364 U.S. 479 (1960).

Smith v. *Schneckloth*, 414 F.2d 680 (9th Cir. 1969).

Sostre v. *McGinnis*, 334 F.2d 906 (2nd Cir.), *cert*. *denied*, 379 U.S. 892 (1964).

Sostre v. *Rockefeller*, 309 F. Supp. 611 (S.D.N.Y. 1970).

Startti v. *Beto*, 405 F.2d 858 (5th Cir. 1969).

Stroud v. *Swope*, 187 F.2d 850 (9th Cir.), *cert*. *denied*, 342 U.S. 829 (1951).

In re Taylor, 187 F.2d 852 (9th Cir.), *cert*. *denied*, 341 U.S. 955 (1951).

United States v. *Carolene Products Co*., 304 U.S. 144 (1938).

United States v. *Muniz*, 374 U.S. 150 (1962).

Wainwright v. *Coonts*, 409 F.2d 1337 (5th Cir. 1969).

Walker v. *Blackwell*, 411 F.2d 23 (5th Cir. 1969).

Whitney v. *California*, 274 U.S. 357 (1927).

Wright v. *McMann*, 387 F.2d 519 (2nd Cir. 1967).

APPENDIX A

SAMPLE QUESTIONNAIRE

The following questionnaire relates to areas of prison administration which have received considerable attention from the courts during the past ten years. The data from this query will be used in a comparative study of prisoner rights within the institution. The effect of court intervention on prison administration and disciplinary decisions will be included. Your assistance will facilitate this institute's effort to determine both the legal rights of prisoners and the long-term effects of the exercise of such rights on discipline and rehabilitative programs within a correctional facility.

1. WHAT IS THE AVERAGE DAILY PRISON POPULATION OF YOUR SYSTEM? __________. Of this number, how many are
    a. Caucasian? __________
    b. Negro? __________
    c. Puerto Rican? __________
    d. Mexican-American? __________
    e. Other? __________

2. ARE PRISONERS PROVIDED A RULE BOOK OR A COPY OF REGULATIONS WHICH OUTLINE THE RULES OF THE INSTITUTION, DISCIPLINARY MEASURES, AND PROCEDURES FOR SUBMITTING COMPLAINTS? (yes) (no) If the answer to this question is Yes, a copy of such rules or regulations would be appreciated.

3. THE FOLLOWING QUESTIONS CONCERN PROCEDURES FOR IMPOSING PUNISHMENT FOR VIOLATIONS OF RULES AND REGULATIONS.

    a. Are inmates who are accused of violating rules or regulations brought before an institution disciplinary board or panel? (yes) (no) If the answer is Yes, please indicate which of the following are members of the board.
        (1) Warden. __________
        (2) Ass't. Warden. __________
        (3) Director of Security. __________
        (4) Director of Treatment. __________

(5) Chaplain. __________
(6) Prison Psychologist. __________
(7) Prison Attorney. __________
(8) Prison Physician. __________

b. Is the inmate allowed to have representation by a lawyer or lawyer substitute? (yes) (no)

c. Is the inmate provided with a written copy of the charges which have been made? (yes) (no)

d. Is the inmate allowed to remain while witnesses are being heard? (yes) (no)

e. Is the inmate allowed to call witnesses before the board? (yes) (no)

f. Is the decision of the disciplinary board final? (yes) (no) If the answer is No, please indicate which of the following have final approval authority:

(1) Director of Corrections. __________
(2) Unit Warden. __________
(3) Ass't. Director of Corrections. __________
(4) Ass't. Warden. __________
(5) Other. ______________________(please specify).

4. THE FOLLOWING QUESTIONS CONCERN ALLOWABLE DISCIPLINARY MEASURES.

a. Which of the following punishments are used in your system?

(1) Flogging. __________
(2) Electric shock. __________
(3) Confinement in stocks or sweatboxes. __________
(4) Handcuffing to cell doors. __________
(5) Standing for extended periods of time (on the line). __________
(6) Punitive segregation with normal food ration. __________
(7) Punitive segregation with restricted diet. __________
(8) Restriction to cell or living area. __________
(9) Loss of privileges. __________
(10) Loss of good time. __________
(11) Counsel and reprimand. __________

b. What is the maximum time an inmate may be kept on a restricted diet? __________

c. When an inmate has reached the maximum allowable time on a restricted diet, how long must he receive the normal prison diet before being placed back on a restricted diet? __________

d. Which of the following most nearly describes the restricted diet?

(1) Normal prison food without meat and condiments. ____

(2) Normal prison vegetables without meat, milk, sweets, or coffee. ____

(3) Bread and water. ____

e. What is the maximum length of time that an inmate may be kept in punitive segregation? ____

f. When an inmate has reached the maximum allowable time in punitive segregation, how long must he remain out of punitive segregation before he can be re-segregated? ____

g. Is the inmate allowed to have reading material while he is in punitive segregation? ____

h. Which of the following may visit an inmate while he is in punitive segregation?

(1) Chaplain. ____
(2) Inmate's Attorney. ____
(3) Family. ____
(4) Inmate may not have any visitors. ____

i. Which of the following items of clothing is an inmate authorized to retain while he is in punitive segregation?

(1) Belt. ____
(2) Shoes. ____
(3) Shirt. ____
(4) Trousers. ____
(5) Undershirt. ____
(6) Shorts. ____

j. Cells used for punitive segregation are equipped with which of the following items:

(1) Bed or cot. ____
(2) Blankets. ____
(3) Running water. ____
(4) Flush toilet. ____
(5) Lights. ____

k. Is an inmate in punitive segregation allowed to receive mail? (yes) (no) If Yes, which of the following is allowed?

(1) Letters from courts. ____
(2) Letters from lawyer. ____
(3) Letters from family. ____

l. Is an inmate in punitive segregation allowed to mail letters? (yes) (no) If Yes, to which of the following listed people:

(1) Letters to court officials. __________
(2) Letters to lawyers. __________
(3) Letters to family. __________

m. Are adequate numbers of segregation cells available for both administrative and punitive segregation? (yes) (no)

n. Are housing facilities over-crowded? (yes) (no)

o. Is an inmate in punitive segregation visited daily? (yes) (no)

5. THE FOLLOWING QUESTIONS CONCERN LEGAL SERVICES AVAILABLE TO INMATES.

a. Does the institution or system employ an attorney to assist inmates in preparing writs and other legal petitions? (yes) (no)

b. Are inmates permitted to assist other inmates in preparing writs and other legal petitions? (yes) (no)

c. Does the institution library contain legal reference material? (yes) (no)

d. Are inmates allowed to retain legal references in their cells or living areas? (yes) (no)

e. Are inmate letters to courts censored? (yes) (no)

f. Are inmate letters to attorneys censored? (yes) (no)

g. Are inmates allowed to write to the warden or director without the letter being read or censored? (yes) (no)

6. THE FOLLOWING QUESTIONS CONCERN MATTERS PERTAINING TO SECURITY MEASURES.

a. Are all letters to inmates inspected? (yes) (no) If No, which of the following are not inspected:

(1) Letters from courts. __________
(2) Letters from the Department of Corrections or other governmental agencies. __________
(3) Letters from lawyers. __________
(4) Letters from family. __________

b. Do security officers carry clubs while inside the cell blocks or living areas? (yes) (no)

c. Are security officers allowed to employ riot control agents without receiving permission from a supervisor? (yes) (no) If No, which of the following may authorize the use of such agents:

(1) Director of Corrections. ________
(2) Unit Warden. ________
(3) Ass't. Warden. ________
(4) Chief Security Officer. ________
(5) Other. ________________________

d. Are selected inmates utilized to guard other inmates? (yes) (no) If Yes, are such inmate guards armed? (yes) (no)

7. THE FOLLOWING QUESTIONS CONCERN RELIGIOUS PRACTICES WITHIN THE INSTITUTION.

a. Does the institution rehabilitative program offer inmates incentives to participate in religious activities? (yes) (no)

b. Are inmates allowed to wear religious medals? (yes) (no)

c. Are chaplains employed by the correctional system? (yes) (no) If Yes, which of the following are employed?

(1) Catholic. ________
(2) Protestant. ________
(3) Jewish. ________
(4) Black Muslim. ________

d. Are ministers and priests who are not employed by the system allowed to visit inmates? (yes) (no)

e. Are ministers and priests who are not employed by the system allowed to conduct religious services? (yes) (no)

f. Are inmates allowed to change religions while incarcerated? (yes) (no)

g. Is the Black Muslim sect a recognized religion in your system? (yes) (no)

h. Are Black Muslim ministers employed by your system? (yes) (no)

i. Are Black Muslim ministers allowed to conduct services within the institution? (yes) (no)

j. Are Negro inmates allowed to have copies of the Black Muslim version of the Koran? (yes) (no)

k. Are Negro inmates allowed to receive Black Muslim magazines and newspapers? (yes) (no)

l. Is there any consideration given to the dietary requirements of Jewish and Black Muslim inmates? (yes) (no)

8. THE FOLLOWING SPACE IS PROVIDED FOR YOU TO MAKE ANY REMARKS WHICH YOU CONSIDER NECESSARY TO EXPLAIN OR CLARIFY THE ABOVE ANSWERS. ANY OTHER ITEMS OF INFORMATION YOU WISH TO INCLUDE WILL BE APPRECIATED.

APPENDIX B

LIST OF STATE DEPARTMENTS OF CORRECTIONS AND FEDERAL CORRECTIONAL INSTITUTIONS RESPONDING TO QUESTIONNAIRE

Arizona

Arkansas

California

Colorado

Delaware

Hawaii

Idaho

Illinois

Iowa

Kentucky

Louisiana

Maryland

Minnesota

Missouri

Montana

Nebraska

New Hampshire

New Jersey

New Mexico

North Dakota

Ohio

Oklahoma

Oregon

South Carolina

South Dakota

Tennessee

Texas

Washington

Wisconsin

Wyoming

District of Columbia Department of Corrections

United States Army Disciplinary Barracks, Fort Leavenworth, Kansas

United States Penitentiary, Atlanta, Georgia

United States Penitentiary, Leavenworth, Kansas

FILMED FROM BEST AVAILABLE COPY